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ABSTRACT

The volume is an expanded and revised edition of informal teaching materials designed for instructional use by both teachers and learners, and is intended to accompany the 1995 text, "The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making Third Edition" (ED 383 256). The supplement's purpose is to facilitate and enrich the teaching of education law and educational administration in graduate schools of education, law schools, and in professional workshops for administrators and attorneys. The volume is divided into three parts: (1) Introduction and Overview; (2) Cases, Notes, Questions, Problems; and (3) Large-Scale Problem-Solving Exercises. Four types of material are included: those providing an orientation to and suggestions for the study of education law; edited judicial opinions illustrating selected facets of the law's development; notes and questions to enhance understanding of the opinions; and practical problems, along with separate appendices of guidelines for resolving them that explore the law's concrete applications to day-to-day administrative challenges in colleges and universities. Individual chapters address the relationship of the college to: trustees/administrators/agents; faculty; community; state government; federal government; educational associations; and the business/industrial community. Appended is a copy of the Constitution of the United States, with provisions of particular interest to postsecondary education, and guidelines for problems and completing problem-solving exercises. (MSE)

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ED 435 324

CASES, PROBLEMS, AND MATERIALS:

AN

INSTRUCTIONAL SUPPLEMENT

TO

THE LAW OF HIGHER EDUCATION

by

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Third Edition
1995

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Preface

A. The Scope and Purpose of this *Supplement*

This volume is an expanded and revised edition of informal teaching materials prepared by the authors in 1989. Designed for instructional use by both teachers and learners, this *Instructional Supplement* complements William Kaplin's and Barbara Lee's text, *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making* (3rd ed., 1995) (Jossey-Bass, Inc., Publishers) *(LHE)*. The *Supplement's* purpose is to facilitate and enrich the teaching and learning of education law and educational administration in graduate schools of education, law schools, and professional workshops for both administrators and attorneys.

The *Instructional Supplement* is divided into three Parts containing four types of materials: materials providing an orientation to, and suggestions for, the study of education law; edited judicial opinions* illustrating selected facets of the law's development; notes and questions to enhance understanding of the opinions; and practical problems, along with separate appendices of guidelines for resolving them, that explore the law's concrete applications to the day-to-day challenges confronting colleges and universities. Thus, this *Supplement*, used in conjunction with the *LHE* text, combines the best features of a casebook, a problems and exercises manual, and a narrative synthesis of higher education law.

The *Supplement*'s organization parallels the organization of the *LHE* text. Part II of the Supplement is keyed to the nine chapters in *LHE*, and particular sections or pages of *LHE* are frequently cited in all three Parts of the *Supplement* as well as in the problem guidelines in the appendices.

B. How to Use this *Supplement*

There are two basic ways in which the instructor may interrelate the *Instructional Supplement* with the *LHE* text:

(1) The instructor may use *LHE* as the primary resource and this *Supplement* as a secondary resource. *LHE* would then be the main source of assigned readings

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* Deletions of text from these opinions are indicated by asterisks or ellipses. Deletions of footnotes are usually made without indication but can be detected by noting missing footnote numbers.

and the main support for class (or workshop) presentations and discussions, while selected materials from the *Supplement* would be used for illustrating particular points of the presentations and discussions, for problem solving practice* and writing assignments, and for independent study. The *Supplement* has been published in looseleaf format to facilitate this type of selective use and to allow the instructor to integrate other teaching materials with those in the *Supplement.*

(2) The instructor may use this *Supplement* as the primary resource and *LHE* as a parallel or secondary resource. The *Supplement* would then be a priority source of assigned readings and the main support for discussions, case analysis, simulations, or other problem-solving exercises.** *LHE* would be a source for assigned background readings, for independent study of particular topics, for assistance with or review of problems and questions in the *Supplement*, and for general review and synthesis; as well as a basic resource for students doing research papers, memos, or other projects.

Instructors may also devise variants of these two basic approaches to suit their particular pedagogical styles and goals, or -- having adopted *LHE* as a course or workshop text -- may simply use this *Supplement* as a personal resource for planning purposes or recommend this *Supplement* to students as an independent study resource.

Part I of the *Supplement* contains materials that orient the reader to the study of education law. Instructors may wish to assign this Part at the beginning of a course or prior to convening a workshop.

Part II of the *Supplement* contains nine sections corresponding to the nine chapters in *LHE*. The particular section(s) of *LHE* that relates to each case and problem in these chapters is indicated on the top of the case's or problem's first page. When the *LHE* text itself quotes substantial portions of a judicial opinion, the *Supplement* provides a caption for the case, a reference to the *LHE* pages that set out the opinion, and notes and questions for study. General references for further study are only occasionally included with these cases and problems, since such references already appear in *LHE* in the textual discussions, the footnotes, and the section-by-section Selected Annotated Bibliographies at the end of each chapter.

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* For information on the pedagogical values of problem-solving exercises, see, e.g., Kurtz, Wylie, and Gold, "Problem-Based Learning: An Alternative Approach To Legal Education," 13 *Dalhousie L.J.* 797 (1990); Nathanson, "The Role of Problem Solving in Legal Education," 39 *J. of Legal Educ.* 167 (1989); and Moskovitz, "Beyond the Case Method: It's Time to Teach with Problems," 42 *J. of Legal Educ.* 241 (1992). These articles draw upon the psychology of learning and would be useful guides whether the setting was a law school, a graduate school of education, or a professional workshop.

** *Id.*

Part III of the *Supplement* is a series of "large-scale" problems whose issues are not confined to a single section or chapter of *LHE*. The *LHE* sections most directly related to each problem are identified in the guidelines in Appendix C (see below). In a course, these problems may be used periodically to synthesize knowledge or to practice professional roles in problem-solving; or they may be used for end-of-course review and synthesis, for independent study, or as the basis for research and writing assignments or examinations. In a workshop, these problems (along with the smaller problems in Part II) may become the central focus of workshop activity. Preceding the first of the large-scale problems is a proposed set of directions for working through the problems in class and a proposed set of basic questions for problem review. Guidelines for working through each problem are contained in Appendix C at the end of the *Supplement*. (Instructors may wish to defer student use of these guidelines until students have completed the problem-solving exercise.) Materials and suggestions for converting these problems into role-playing simulations are also available, by request, from the authors.

In any course or workshop using *LHE* as a required resource, the instructor may reproduce and distribute the *Supplement*, or selected portions of it, to participants in the course or workshop. No other reproduction or distribution is permitted.

C. Use of this *Supplement* by Persons Without Legal Training

This *Supplement* is designed for use not only by law students and lawyers, but also by education students, educators, and others who may not have prior training or background in law. The Introduction and Overview in Part I speaks directly to both groups. (Nonlawyers should pay particular attention to the suggestions and cited resources in section E of Part I.) The cases in Part II are edited, and the notes and questions are crafted, to accommodate the needs and perspectives of both groups. The problems are also designed so that they may be addressed from the perspective of either group -- or from the perspectives of both, allowing for comparison and accommodation of viewpoints as well as cooperative problem-solving experiences.

In courses for education students and workshops for educators, and in courses or workshops that mix both groups together, the materials in this *Supplement* should be used with an important caution in mind: educators need not learn to know the law like lawyers know the law, to analyze problems like lawyers do, or to perform the functions that lawyers perform. In real-world settings, there are lawyers available to do these things. Educators, administrators, and public policy-makers have different roles -- roles in which it is more critical to know about law than to know the law; more critical to know how to analyze problems from their own discipline's perspective, against the backdrop of law, than to analyze problems from the lawyer's perspective; and more critical to know how to work with lawyers in performing their own functions, than to perform the lawyers' functions for them.

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June 1995

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PART I

INTRODUCTION AND OVERVIEW

A. The Universe of Education Law

Higher education law -- the specific focus of this *Instructional Supplement* and the *Law of Higher Education* text (*LHE*) -- is part of the broader universe of education law. This universe encompasses not only the law regarding higher and other postsecondary education but also the law regarding "lower" education, i.e., elementary and secondary education (K-12) as well as pre-school education. (For a resource on K-12 education, see W. Valente, *Education Law Public and Private* (2 vols., 1985).) These "higher" and "lower" sectors can be further divided into public education and private education sectors, as indicated in the illustration below, thus producing a universe of four quadrants: public higher education, public lower education, private higher education, and private lower education. Finally, the private education quadrants can be subdivided yet again into private secular education and private sectarian (or religiously affiliated) education, as the illustration also indicates.

Each sector displayed in the illustration is legally distinct from the other sectors. The boundary lines within the education law universe thus represent important legal distinctions --distinctions undergirding legal analysis of education law problems. Because the applicable sources of law (sec. C below), the legal reasoning, and the result or conclusion reached may differ from one sector to another, it is important to begin analysis of each judicial opinion by determining the sector of the education law universe with which it deals. Similarly, when first approaching a new issue or problem, it is important to ascertain its location within this universe. In a higher education law course, therefore, one would ask: Does this case or problem deal with public higher education or with private higher education? (See *LHE* § 1.5.) If it is private higher education, then one would ask: Does this case or problem deal with secular higher education or with sectarian/ religiously affiliated higher education? (See *LHE* § 1.6.)

ILLUSTRATION

THE EDUCATION LAW UNIVERSE

	PUBLIC EDUCATION	PRIVATE EDUCATION	
		Secular	Sectarian
HIGHER EDUCATION	Public Colleges, Universities, and Community Colleges	Private Secular Colleges and Universities	Private Religiously Affiliated Colleges and Universities
LOWER EDUCATION	Public Elementary Schools, Secondary Schools, and Pre-schools	Private Secular Elem. Schools, Secondary Schools, and Pre-Schools	Private Religiously Affiliated Elem. Schools, Secondary Schools, and Pre-Schools

To further expand understanding, one could also ask whether the problem or case would be reasoned or resolved differently (and why) if it had involved private [public] rather than public [private] higher education, or religiously affiliated [secular] rather than secular [religiously affiliated] higher education. These distinctions and their significance in various contexts are emphasized throughout *LHE* and the materials in this *Supplement*. Finally, for the broadest perspective, one might ask whether the problem or case would be reasoned or resolved differently if it had involved lower education rather than higher education (see *LHE*, § 1.3.5., pp. 12-13).

B. The Governance of Higher Education

Early in the study of higher education law, attention should be given to the *governance* of higher education, that is, the structures and processes by which higher education institutions and systems are governed. Through these structures and processes various "actors" gain and exercise authority over institutional affairs (see *LHE* §§ 2.1. and 2.2.). The concept of governance can be divided into two categories: internal governance and external governance. Internal governance refers to the structures and processes by which an institution governs itself (see *LHE* § 1.3.2.). External governance refers to the structures and processes by which outside entities (that is, entities external to the institution itself) play a role in the governance of institutional affairs (see *LHE* § 1.3.1.). In turn, external governance may be further divided into two sub-categories: public external governance and private external governance. Public external governance refers to structures and processes by which the federal government (see *LHE* § 7.1.) and state and local governments (see *LHE* §§ 5.1. and 6.1.) participate in the governance of higher education. Private external governance refers to the structures and processes by which private organizations, such as accrediting associations (see *LHE* § 8.3.) and athletic conferences (see *LHE* § 8.4.) participate in the governance of higher education.

A focus on governance, and thus on questions of authority, is important to the study of higher education law -- and to problem solving in higher education law -- because governance structures and processes provide the legal and administrative context in which issues and disputes arise. The typical predicate to a legal problem is an exercise of power, by an actor or actors within the governance structure, that allegedly causes harm to some other party within or subject to the governance structure. When the power is exercised by a person or organization acting for the institution, and the aggrieved party is a student, faculty member, staff member, or administrator, internal governance is usually the focus of the problem. On the other hand, when the power is exercised by a government agency or private organization outside the institution, external governance is usually the focus. External governance issues can pit government agencies and private organizations against the institution itself as a legal entity, against a captive or affiliated organization of the institution (see *LHE* § 2.2.5.), or against the institution's students, faculty members, staff members, or administrators.

The two categories of internal and external governance may sometimes overlap, and a problem in one category may sometimes "cross over" to the other. An internal dispute about sexual harassment of a student by an employee, for instance, may be influenced not only by internal institutional policies regarding harassment but also by the external non-discrimination requirements of the federal Title IX statute (see *LHE* § 4.7.3.). Although a sexual harassment dispute may initially be handled through an institution's internal governance process (e.g., a grievance mechanism), it may later become an external matter if one of the parties sues the other party or the institution in court.

The governance structures and processes for higher education differ markedly from those for elementary and secondary education; thus the basic boundary line in the "Education Law Universe" (sec. A above) is equally applicable to matters of governance. Similarly, the boundary lines between public and private higher education institutions, and between private secular and private sectarian institutions, also indicate parallel distinctions in the governance of higher education. Therefore, just as the law may vary from one sector to another of the education law universe, the governance structures and processes may vary as well. Thus, whenever one is confronting a legal problem (or even reading a judicial opinion), it is well to begin the analysis not only by determining the sector of the universe within which the problem falls, but also by identifying the particular governance structure or process from which the problem arose and through which it might be resolved.

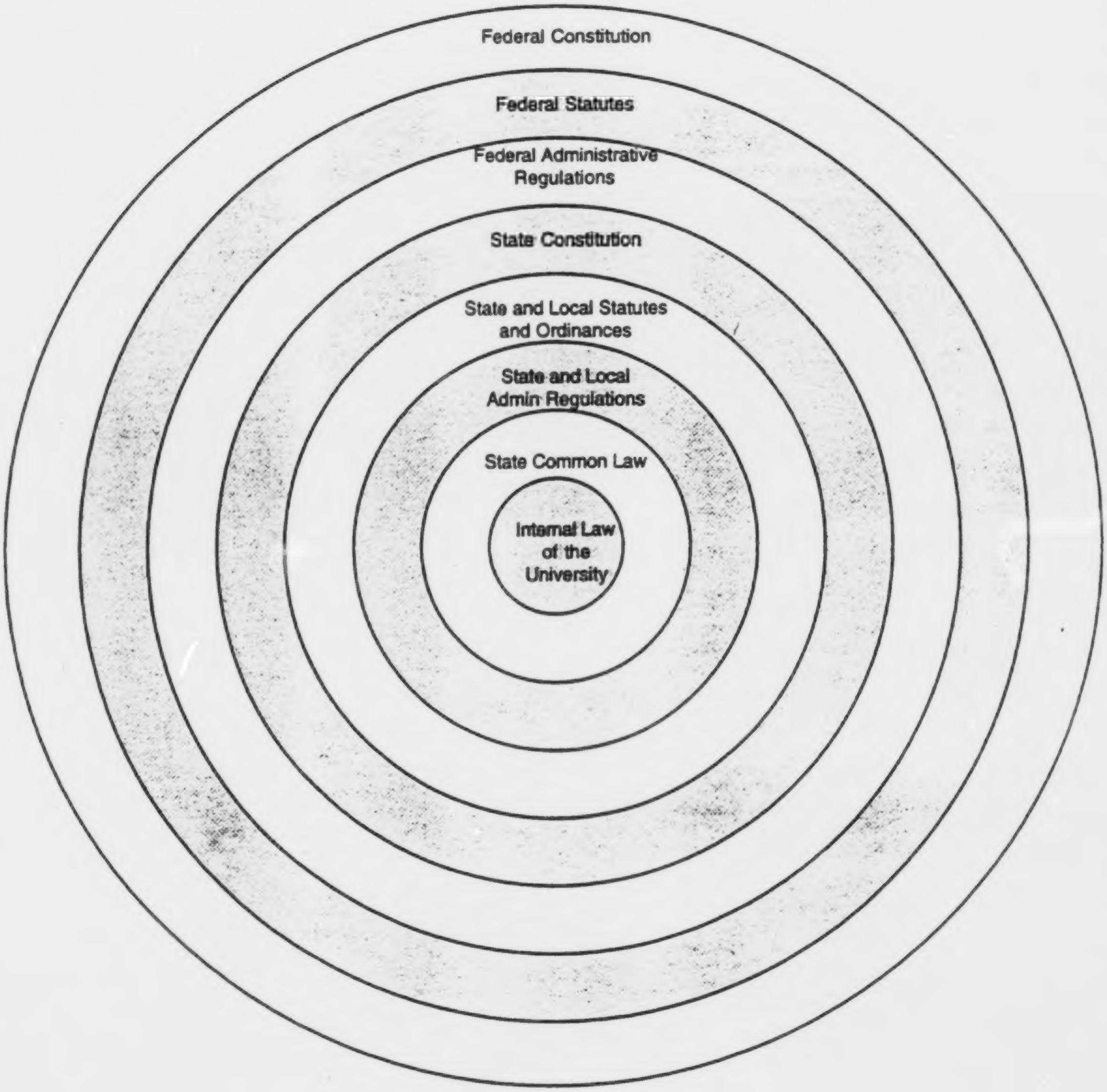
C. Sources of Higher Education Law

As a keystone of their internal governance systems, higher educational institutions create "internal law" that delineates authority and rights, and embodies the rules and procedures, by which institutions govern themselves. There are three main sources of internal law: institutional rules and regulations (*LHE* § 1.3.2.1.), institutional contracts (*LHE* § 1.3.2.2.), and academic custom and usage (*LHE* § 1.3.2.3.). Circumscribing this internal law is the external law created by the federal government and state and local governments through their own governance processes (*LHE* § 1.3.1.). The illustration on "The External Law Circumscribing the Internal Law" lists the most common and important sources of external law and shows how they circumscribe, and thus serve to constrain, the institution's internal law. Each ring of law in the illustration is superior to the other rings of law that are further inside and inferior to the other rings of law that are further outside. Thus, in case of inconsistencies among sources of law, the law in the ring farthest from the center will prevail. All sources of external law will therefore take precedence over internal law when the internal law is inconsistent with external law.

These sources of law, and the interrelations among them, are another factor to consider -- along with the education law universe sectors and the governance structures and processes (secs. A & B above) -- when solving problems or reading cases in higher education law. Just as one needs to identify the governance structure or process pertinent to the problem or judicial opinion, one also needs to identify the pertinent source(s) of law that can be used to analyze the problem or that forms the basis for the judicial opinion.

ILLUSTRATION:

THE EXTERNAL LAW CIRCUMSCRIBING THE INTERNAL LAW


Federal Constitution
Federal Statutes
Federal Administrative Regulations
State Constitution
State and Local Statutes and Ordinances
State and Local Admin Regulations
State Common Law
Internal Law of the University

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D. The Law/Policy Distinction

In addition to the public/private and secular/sectarian distinctions that one must account for in studying higher education law (see sec. A. above), there is also an overarching distinction between legal issues and policy issues. In brief, legal issues are stated and analyzed using the norms and principles of the legal system, resulting in conclusions and advice on what the law requires or permits in a given circumstance. Policy issues, in comparison, are stated and analyzed using norms and principles of administration and management, the social sciences, ethics, and other relevant disciplines; the resulting conclusions and advice focus on the best options available for resolving a particular problem and the best manner of effectuating them.

Just as legal issues may arise from sources both internal and external to the institution (see sec. C above), policy issues may arise -- and policy may be made -- both within and outside the institution. Internally, the educators and administrators (including the trustees) make the policy decisions that create what we may think of as "educational policy" or "institutional policy." Externally, legislatures, executive branch officials, and heads of administrative agencies make policy decisions that create what we may think of as "public policy." In either case, policy must be made and policy issues resolved within the constraints of the law.

It is important to focus on this vital interrelationship between law and policy whenever you are analyzing judicial opinions or addressing particular problems. You may ask not only "What are the legal issues presented?" but also "What are the educational policy or public policy issues presented?" The two sets of issues obviously can overlap and intertwine. Lawyers and educators alike may study both sets of issues; neither area is reserved for the cognitive processes of one profession to the exclusion of the other. Yet lawyers and law students may appropriately think about and react to legal issues differently than do educators and education students, and the same may be true for policy issues. There are matters of role and expertise to account for in the process of problem solving and preventive legal planning (see *LHE* § 1.7.). The policy aspects of a problem may be more the bailiwick of the educator, the legal aspects more the bailiwick of the lawyer. Among the most practical insights that may come from a higher education law course or workshop are these insights concerning roles and the ways in which educators and lawyers may work together on matters with legal ramifications.

E. The Legal System As It Relates to Higher Education Law

Legal issues concerning higher education may arise not only in the courts (trial courts and appellate courts) but also in legislatures and in a wide variety of administrative agencies. Thus the law applicable to higher education may be developed, and legal disputes may be resolved, not only in judicial opinions but also in statutes and ordinances, and in administrative regulations and adjudications. This law development and dispute-resolution, moreover, takes place at all three levels of government -- federal, state, and local. It is thus important for students studying higher education law to have a basic understanding -- in relation to higher education's concerns -- of the U.S. legal system, the system of courts that is a constituent part of the legal system, the roles of lawyers within the legal system, and the legal materials and research tools by which one accesses the law developed through the legal system.

Chapter I of the *LHE* text, in conjunction with Part I of this *Supplement*, should provide the necessary introductory background on these matters. Most of the legal concepts and information in Chapter I of *LHE* will already be familiar to law students and lawyers, who may use this material for review and to sensitize themselves to the particular concerns of higher education. Students and educators without legal training or background, on the other hand, will find new material in Chapter I -- especially *LHE* sections 1.1., 1.3.3., 1.4., 1.5.1., and 1.7. -- that deserves careful consideration for the light it sheds on the topics listed above.

For additional introductory materials for non-law students and non-lawyers, and for resources for them to use as references, see AALL Legal Information Service to the Public, *How to Research a Legal Problem : A Guide for Non-Lawyers* (Am. Ass'n of Law Libraries, 1993); S. Burton, *An Introduction to Law and Legal Reasoning* (1985) (esp. Introduction and chaps. 1-3); E. A. Farnsworth, *An Introduction to the Legal System of the United States* (2nd ed. 1983); D. Mellinkoff, *Dictionary of American Legal Usage* (West, 1992); and C. Wren & J. Wren, *The Legal Research Manual* (2nd ed. 1986) (esp. chaps. 1 & 2, and appendices C & L). In addition, Appendix A in this Supplement, containing "he Constitution of the United States: Provisions of Particular Interest to Postsecondary Education," will be a useful resource.

PART II

CASES, NOTES, QUESTIONS, PROBLEMS

A.

CHAPTER I: OVERVIEW OF POSTSECONDARY EDUCATION

SEC. 1.4.3.6. Standards of Judicial Review and Burdens of Proof.

McConnell v. Howard University
818 F.2d 58 (D.C. Cir. 1987)

This case is reproduced in Part II (C) of this *Supplement* (under sec. 3.5), along with notes and questions. See especially note 3.

SEC. 1.5.2. The State Action Doctrine.

Krynicky v. University of Pittsburgh
742 F.2d 94 (3d Cir. 1984)

BECKER, Circuit Judge.

These consolidated appeals present the question whether the recent Supreme Court decisions in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982); and *Blum v. Yaretsky*, 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982), in effect overruled this court's decision in *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977) (in banc), which held that the University of Pittsburgh (and by implication Temple University) are "state actors" for purposes of 42 U.S.C. § 1983.

The district courts reached differing results. In *Krynicky* the district court concluded that the *Lugar* trilogy had undermined *Braden*, and held that, because the Commonwealth of Pennsylvania had not participated with the University of Pittsburgh in making the faculty tenure decision challenged by *Krynicky*, the University's decision was not subject to the constraints of the fourteenth amendment. In *Schier* the district court reached the opposite result, holding that *Braden* was still controlling, and that the Commonwealth had so far insinuated itself into the operation of Temple University that the institution was subject to the mandates of the fourteenth amendment in connection with *Schier*'s claim of retaliatory discharge.

Because we believe that *Braden* has not been overruled by the *Lugar* trilogy, we reverse in *Krynicky* and affirm *Schier*.

I. FACTUAL AND PROCEDURAL HISTORY

A. Krynicky

Harry Krynicky, an Assistant Professor of English at the University of Pittsburgh, brought suit against the University and various administrative officials under 42 U.S.C. § 1983, alleging that he had a "property" and "liberty" interest in his employment contract within the meaning of the fourteenth amendment, and that the University infringed those interests when it failed to notify him in a timely fashion of its decision to deny him tenure. In addition, Krynicky alleged that the tenure process generally denied him due process, and that the decision to deny him tenure was made in retaliation for his outspoken criticism of the University administration and his unorthodox teaching methods. The linchpin of Krynicky's claim for purposes of this appeal is that the University's actions were taken "under color of state law" within the meaning of § 1983 because of the relationship between the Commonwealth of Pennsylvania and the University.

The University and the individual defendants moved for summary judgment, but did not contest the existence of state action. The district court granted the motions in part. 560 F.Supp. 803.[2] Defendants then amended their answer to assert that there was no state action as required by § 1983, and again moved for summary judgment. The district court thereupon granted the motion as to the remaining claims, stating that the reasoning of *Rendell-Baker* and *Blum* essentially superseded the Third Circuit's analysis in *Braden*, and that, therefore, *Braden* did not control. The court held that "the receipt of revenue from the state, membership of state nominees on the University's Board of Trustees, and statutory recognition that the University is part of the state's system of higher education are not sufficient to make the University's employment policies state decisions." *Krynicky v. University of Pittsburgh*, 563 F. Supp. 788, 789 (W.D. Pa. 1983).

B. Schier

Rosemary Schier, who was an employee of Temple University Hospital from September 1979 through September 3, 1981, brought suit against the University alleging that during the course of her employment, she was discriminated against on grounds of her sex, and that her supervisor had sexually harassed her, had retaliated against her for having filed internal complaints, and had forced her to sign a resignation memorandum. Schier sought relief under 42 U.S.C. § 1983 and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

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[2] With respect to the due process claims under § 1983, defendants asserted that the University had provided Krynicky with complete procedural due process prior to the challenged employment decisions and that, furthermore, as a matter of law, Krynicky had no "property or liberty" right in continued employment at the University. With respect to the first amendment claim under § 1983, they asserted that it was barred by the applicable statute of limitation. The district court granted the motion as to the due process claim but denied it as to the first amendment claim, stating that the cause of action was not time-barred.

With respect to the state-law claims, the defendants asserted that under University regulations, Krynicky had received notice within the specified time period and had failed to exhaust all internal University procedures and remedies before filing the suit. They also asserted that the emotional distress claims were time-barred. The district court granted the defendants' motion on these two claims.

At the close of discovery, Temple moved for summary judgment on all claims, asserting that the Title VII claim was time-barred and that Schier had not presented any facts to support her claim that Temple had acted under color of state law for the purposes of § 1983. The district court granted summary judgment on Schier's Title VII claim, but denied Temple's motion on the § 1983 claim, holding that, under the symbiotic relationship test for state action articulated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961), the state had a sufficiently close relationship with Temple that actions taken by Temple were subject to constitutional scrutiny under section 1983. In reaching its decision, the district court considered the applicability of the Lugar trilogy to its decision, but concluded that *Blum* and *Rendell-Baker* did not overrule *Burton*, and that, therefore, the Third Circuit's opinion in *Braden* was still good law. *Schier v. Temple University*, 576 F. Supp. 1569, slip op. at 19-20 (E.D. Pa. 1984). However, recognizing that another district court in the circuit had reached the opposite result in the *Krynicky* case, the court certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) the question "whether, for the purposes of 42 U.S.C. § 1983, acts performed by employees of a statutorily designated 'state-related' institution of higher education such as Temple University constitute 'state action.'" We agreed to hear the appeal.

II. DISCUSSION

A. The State Action Requirement and the State Action Tests

The fifth and fourteenth amendments protect individuals only from governmental action. In order for Krynicky or Schier to benefit from these constitutional protections, they must show that the alleged violations of due process and freedom of speech are "fairly attributable to the state." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982). The "state action requirement" preserves "individual freedom by limiting the reach of federal law and federal judicial power" and avoids "imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936.

The requirement of section 1983 that the challenged activity be taken "under color of state law"[3] has been treated as identical to the "state action" element of the fourteenth amendment. *Lugar*, 457 U.S. at 929; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 n.7, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). What constitutes sufficient state participation to attribute activity to the state under section 1983 has proved to be an extremely difficult question....

The Supreme Court to date has not developed a uniform test for ascertaining when state action exists and has stated that no such unitary test is possible. *Reitman v. Mulkey*, 387 U.S. 369, 378, 18 L. Ed. 2d 830, 87 S. Ct. 1627 (1967). Instead, the Court has adopted a number of approaches whose application depends upon the circumstances. The Court has suggested that lower courts investigate carefully the facts of each case. *Burton*, 365 U.S. at 722. Two of the approaches are relevant to these appeals: the " symbiotic relationship" test and the "nexus" test.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961), the Supreme Court found state action where there was a "symbiotic relationship" between the acting party and the state.[5] The Court held that state action exists when:

> The State has so far insinuated itself into a position of interdependence with... [the acting party] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment. *Id.* at 725.

In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974), the Court held that state action may also exist when the state becomes sufficiently involved in the particular challenged activity.[6] The Court suggested that in considering the state action issue, the "inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the ... entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351.

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[3] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[5] In *Burton*, plaintiffs brought suit under 42 U.S.C. § 1983, alleging that the Wilmington Parking Authority, a state entity, was responsible for the racially discriminatory practices of a privately-owned coffee shop located in a building owned by the authority. In the lease between the coffee shop and the Authority, the shop had agreed to abide by all applicable laws, statutes, ordinances, rules, and regulations of any federal, state, or municipal authority. The Authority, in turn, agreed to provide all maintenance and upkeep of the premises and to make any necessary structural or exterior repairs.

In *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977), we confronted the question whether the University of Pittsburgh acted under the color of state law with respect to a claim almost identical to that of Ms. Schier. We rejected Pitt's contention that *Jackson* had overruled *Burton*, stating:

> Based on a review of the Supreme Court's opinion in *Jackson*, we believe that that decision would not preclude application of the precepts of *Burton* here, should the appropriate state-private relationship exist. Instead of overruling *Burton*, the *Jackson* Court merely distinguished the earlier opinion, finding "absent in [*Jackson*] the symbiotic relationship presented in *Burton* ..."

Braden, 552 F.2d at 957, citing *Jackson*, 419 U.S. at 357. Based on the provisions of University of Pittsburgh-Commonwealth Act, Pa. Stat. Ann. tit. 24, §§ 2510-201 to 211, we concluded that Pennsylvania had so far insinuated itself into a position of interdependence with the University of Pittsburgh that there was a symbiotic relationship between the two, and we therefore held that the actions of the University could fairly be attributed to the state for purposes of satisfying the state action requirement of section 1983.

Unless *Braden* has been overruled by the Supreme Court's recent *Lugar* trilogy, it is binding precedent for the proposition that the University of Pittsburgh and the Commonwealth of Pennsylvania are involved in a "symbiotic relationship,"[7] and therefore, that the actions of the University are actions taken under color of state law for purposes of section 1983. Moreover, since the Temple University-Commonwealth Act, which sets out the relationship between Temple and the State, is virtually identical to University of Pittsburgh-Commonwealth Act, which was the basis for our conclusion in *Braden* that Pitt and the Commonwealth have a symbiotic relationship, there can be no doubt that, if *Braden* has not been overruled, it requires the conclusion that the actions of Temple, like Pitt, are actions taken under color of state law.

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[6] *Jackson* concerned a privately owned and operated utility. The plaintiff, a customer, alleged a violation of due process when the utility terminated her electric service without notice, a hearing, or any opportunity to pay the past due amounts. In the particular case, the Supreme Court held that the Commonwealth of Pennsylvania was not sufficiently involved in the particular challenged activity to convert it into state action.

[7] The statute analyzed in *Braden* continues in effect at this time.

Pitt and Temple make two arguments in support of their contention that *Braden* has been overruled:

> (1) the *Lugar* trilogy overruled or at a minimum, limited *Burton v. Wilmington Parking Authority* to its facts, and therefore *Braden*, which relies on *Burton*, is no longer good law; and
>
> (2) even if the symbiotic relationship test remains viable, the *Lugar* trilogy has clarified that test and, as a result, it is now clear that the Third Circuit in *Braden* misapplied *Burton* when it concluded that a symbiotic relationship existed between Pitt and the Commonwealth.

We consider these arguments in turn.

B. The Impact of the *Lugar* Trilogy on *Burton*

In *Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982), teachers who were discharged from the New Perspectives School, a non-public school, because they had opposed school policies and threatened to form a union, brought suit under 42 U.S.C. § 1983, alleging violations of their constitutional rights under the first, fifth, and fourteenth amendments. The plaintiffs cited several factors that allegedly supported attribution of the New Perspectives School's actions to the state. First, the New Perspectives School, which specializes in dealing with students who have difficulty completing high school, receives nearly all its students from referrals by various city school committees or from a state drug rehabilitation program. Second, the referring school committee pays for the student's education; consequently, the school receives almost 100 percent of its funding from the state. Third, in order to receive the tuition funding, the school must comply with various regulations created by the State, including some general administrative guidelines on personnel policies such as the type of records that must be kept. *Rendell-Baker v. Kohn*, 457 U.S. at 833.

Despite the presence of these factors offered to support state action, the Supreme Court held that the actions of the New Perspectives School could not be attributed to the state under § 1983. In reaching this determination, the *Rendell-Baker* Court first applied the nexus test of *Jackson* and determined that the state had not "compelled or even influenced by any state regulation" the decision to fire the plaintiffs. *Rendell-Baker*, 457 U.S. at 841. The Court then considered the assertion that the New Perspectives School met the symbiotic relationship test as set forth in *Burton*:

> In *Burton*, the Court held that the refusal of a restaurant located in a public parking garage to serve Negroes constituted state action. The Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage. *Burton*, [365 U.S.] at 723, 81 S. Ct. at 860. In response to the argument that the restaurant's profits, and hence the State's financial position, would suffer if it did not discriminate, the Court concluded that this showed that the State profited from the restaurant's discriminatory conduct. The Court viewed this as support for the conclusion that the State should be charged with the discriminatory actions. Here the school's fiscal relationship with the State is not different from that of many contractors performing services for the government. No symbiotic relationship such as existed in *Burton* exists here.

Id. 457 U.S. at 842-43. After finding that the New Perspectives School failed the "public function" test as well, *id.* at 842, the Court held that there was no state action, and consequently that no claim for relief under 42 U.S.C. section 1983 was stated.

Blum v. Yaretsky, 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982), also involved a suit under section 1983. The plaintiffs alleged violations of due process in the decision of a "Utility Review Committee" of The American Nursing Home in New York City to transfer Medicaid patients from high-care to lower-care facilities pursuant to federal regulations. The Supreme Court once again utilized the nexus test and failed to find state action, stating that there was no evidence that the State had "exercised coercive power or ... provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004. The Court then applied the *Burton* symbiotic relationship test. It rejected the contention that state licensing and funding converts private action into state action, stating:

> As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*. That programs undertaken by the State result in

> substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.

Id. at 1011 (citations omitted). Finding that the American Nursing Home also failed to perform a function "traditionally the exclusive prerogative of the State," *id.* at 1011, citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353, the Court again concluded that there was no state action.

Lugar v. Edmondson Oil Co., Inc., the final member of the trilogy, did not have occasion to discuss the *Burton* symbiotic relationship test, and, therefore, that case is not directly relevant to the present discussion.

* * * *

As is apparent from the preceding discussion, the Supreme Court in the *Lugar* trilogy clearly treated the symbiotic relationship test as a viable framework of analysis, but concluded that *Burton* was inapposite to the factual scenarios of those cases. The only indicia of state involvement in *Rendell-Baker* and *Blum* were financial assistance and routine state regulation. By comparison, in *Burton* the state was much more intertwined with the Eagle Coffee Shop: the shop was located in a state-owned building; the state maintained the facility and made all necessary repairs; and the coffee shop and the state conferred mutual benefits on each other because of their location. Thus, we reject Temple and Pitt's assertion that *Rendell-Baker* and *Blum* eliminate the *Burton* symbiotic relationship test.

C. The Impact of the *Lugar* Trilogy on *Braden*

Alternatively, Pitt and Temple argue that *Blum* and *Rendell-Baker* preclude the finding of a symbiotic relationship unless it can be shown that the state benefits financially from the activities of the defendant. Such a financial relationship was present in the *Burton* case, but was not proved in *Braden*, and was not, the defendants contend, demonstrated here. Thus, the defendants argue that although *Burton* may still be good law after the *Lugar* trilogy, *Braden* has implicitly been overruled and we should find that there is no symbiotic relationship in the cases of Pitt and Temple.

It is true that the Supreme Court in *Blum* and *Rendell-Baker* focused on the financial relationship between the defendants and the State, but that was because the financial relationship was the only significant form of state influence over the defendants in those cases. The Court concluded that merely proving the existence of the limited type of financial relationship present in those cases was not sufficient to establish the requisite symbiotic relationship. By way of contrast, the Court in *Burton* emphasized the complete intermingling of state and private actions that were present in that case as grounds for its conclusion that a symbiotic relationship existed. The court referred to fact that the state-owned Parking Authority financially benefitted from renting to the coffee shop, but the Court also emphasized that the coffee shop was located in a building owned and operated by the State. It is apparent from the opinion that this second factor is at least as important as the financial relationship.

The Commonwealth's interrelationship with Pitt and Temple in these cases is more closely analogous to the complete intermingling of state and private actors found in *Burton* than to the relatively minimal interrelationship between the State and the defendants in *Blum* and *Rendell-Baker*. An examination of the statutes that create and define the Commonwealth's relationship with Pitt and Temple demonstrates this fact. Cf. Pa. Stat. Ann. tit. 24, §§ 2510-1 to 11 (Temple University-Commonwealth Act), Pa. Stat. Ann. tit. 24, §§ 2510-201 to 211 (University of Pittsburgh-Commonwealth Act). Since the two statutes are virtually identical, we will refer specifically only to the University of Pittsburgh statute.

To begin with, the statute was enacted to save the Commonwealth the expense of creating an additional state college.[9] In addition, the statute changes the name of the University of Pittsburgh to "The University of Pittsburgh -- Of the Commonwealth System of Higher Education." Pa. Stat. Ann. tit. 24, § 2510-203 (Purdon 1966). Consonant with this linkage, the legislature declares it to be the purpose of the Act to extend the opportunities for higher education in the Commonwealth "by establishing University of Pittsburgh as an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth System of higher education." Pa. Stat. Ann. tit. 24, § 2510-202 (Purdon 1966) (emphasis added). This same section also provides:

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[9] As we stated in *Braden*:

> Prior to adoption of the Act, the University desperately needed a source of funds to maintain its operations. The situation was described by Pitt officials and trustees as grave. At the same time, the Commonwealth desired to satisfy the needs of the populace for expanded facilities for higher education. As the existing state educational institutions were insufficient to satisfy the public demand, and because the creation of new state universities would have been extremely expensive, the decision was made to incorporate established, but financially ailing private institutions into the Commonwealth system of higher education. The state thus was able to satisfy the educational needs of its citizens at a cost considerably lower than would have been entailed by the creation of wholly new institutions. Concomitantly, Pitt was able to survive as an institution of higher education, even though it may have been forced to relinquish its traditional autonomy as a private facility.

> That the Commonwealth of Pennsylvania recognizes University of Pittsburgh as an integral part of a system of higher education in Pennsylvania, and that it is desirable and in the public interest to perpetuate and extend the relationship between the Commonwealth of Pennsylvania and University of Pittsburgh for the purpose of improving and strengthening higher education by designating University of Pittsburgh as a State-related university.

Pa. Stat. Ann. tit. 24, § 2510-202 (Purdon 1966).

The statute also furnishes the "nuts and bolts" of this linkage. It provides that one-third of the University's trustees are to be selected by the Commonwealth, Pa. Stat. Ann. tit. 24, § 2510-204(b) (Purdon 1966), and that the Governor of Pennsylvania, the Mayor of the City of Pittsburgh, and the Superintendent of the Department of Public Instruction are trustees ex officio.[10] Pa. Stat. Ann. tit. 24, § 2510-204(a) (Purdon 1966). The Act provides that the Commonwealth will make annual appropriations to the University, to be used as specified by the state, and that the appropriated funds must be kept in a specific account. Pa. Stat. Ann. tit. 4, § 2510-207 (1966).[11] The state may further set tuition and fee schedules for Pennsylvania students in the annual appropriation act. Pa. Stat. Ann. tit. 24, § 2510-206 (1966).

The Act also mandates that the University "file with the General Assembly and with the

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Braden, 552 F.2d at 961 (footnotes omitted).

[10] In the Temple statute, the Mayor of Philadelphia, rather than the Mayor of Pittsburgh, is an ex officio trustee. Pa. Stat. Ann. tit. 24, § 2510-4(a) (1965).

[11] For example, for the fiscal year July, 1982 through June, 1983, the General Assembly appropriated $78,235,000 to the University of Pittsburgh.

Auditor General of the Commonwealth, a statement setting forth the amounts and purposes of all expenditures made from both the Commonwealth Appropriation Account and other University accounts during the fiscal year." Pa. Stat. Ann. tit. 24, § 2510-207 (Purdon 1966). The statute entitles the University to benefit from all Commonwealth programs for capital development, Pa. Stat. Ann. tit. 24, § 2510-208 (Purdon 1968), and creates a state tax exemption for income derived from bonds issued by the University and loans secured by its mortgages. Pa. Stat. Ann. tit. 24, § 2510-209 (Purdon 1966). Finally, the Chancellor of the University must file annually a report of all University activities, "instructional, administrative and financial," with the Board of Trustees who "shall transmit [the report] to the Governor and to the members of the General Assembly." Pa. Stat. Ann. tit. 24, § 2510-210 (Purdon 1966).

The logic of *Rendell-Baker* and *Blum* is that state contributions to otherwise private entities, no matter how great those contributions may be, will not of themselves transform a private actor into a state actor. In the cases of Pitt and Temple, to the contrary, the issue is not whether the level of state contributions has reached a magic figure necessary to effect this transformation, but rather the affirmative state act of statutorily accepting responsibility for these institutions. This fact, above all, marks the difference between these two institutions and those discussed by the Supreme Court in *Rendell-Baker* and *Blum*.

In addition, unlike the school in *Rendell-Baker* and the nursing home in *Blum*, Temple and Pitt are not merely private contractors with the state. Not only do they receive present financial support, but also the state has committed itself to future financial aid and sets an annual appropriation policy and tuition rate. There is nothing to indicate that the state could not discontinue its support of the New Perspectives School or the American Nursing Home at any time by the simple means of not renewing their contracts. By contrast, it would require a legislative enactment to disentangle Temple and Pitt from the Commonwealth, and the idea that legislative appropriations to these institutions might be severely curtailed is unrealistic. Cf. Pa. Stat. Ann. tit. 24, § 2510(b). Furthermore, neither of the institutions in *Rendell-Baker* or *Blum* had to submit to state-sponsored audits or make yearly reports to the State Assembly. Finally, unlike the institutions in *Blum* and *Rendell-Baker*, one-third of the Trustees of Pitt and Temple are now appointed by the state. Temple and Pitt are not merely "private contractors performing services for the government," *Rendell-Baker*, 457 U.S. at 843; they not only receive funding and are subject to routine state regulations, but are instrumentalities of the state, both in name and in fact.

In sum, we see nothing in either or *Rendell-Baker* that conflicts with *Braden* or its rationale, and, therefore, we conclude that the Supreme Court did not overrule our decision in *Braden*.

III. CONCLUSION

We hold that the Supreme Court's recent decisions in the so-called *Lugar* trilogy do not overrule either the Supreme Court's decision in *Burton v. Wilmington Parking Authority* or our opinion in *Braden v. University of Pittsburgh*. Therefore, we are bound by Third Circuit precedent to hold that a "symbiotic relationship" exists between the Commonwealth of Pennsylvania on the one hand and Pitt and Temple on the other. Actions taken by those two institutions are, therefore, actions taken under color of state law and are subject to scrutiny under section 1983. Consequently, we will reverse the judgment of the district court in *Krynicky v. University of Pittsburgh* and affirm the judgment of the district court in *Schier v. Temple University*, and will remand both cases for further proceedings consistent with this opinion.

Notes and Questions

1. As *Krynicky* illustrates, state action law has been refined in significant ways by the trilogy of U.S. Supreme Court cases decided in 1982, the most important of which for higher education is *Rendell-Baker v. Kohn* [*LHE*, § 1.5.2., pp. 51-52]. Although compatible with the Second Circuit's prior reasoning on the matters addressed in *Krynicky*, and thus supportive of the state action finding in this case, the trilogy does confirm a narrowing trend in the law that makes state action findings less likely in other types of situations.

2. The court in *Krynicky* describes two basic approaches to state action analysis: the "symbiotic relationship" and the "nexus." (Both approaches are subsumed under the "government contacts theory" as discussed in *LHE*, sec. 1.5.2.) How do these two approaches differ from one another? In what situations should the first approach be used, and in what situations the second? Why did the court in *Krynicky* emphasize the symbiotic relationship approach rather than the nexus approach?

3. Under the symbiotic relationship test, what elements of the state's relationship with the two universities does the court analyze? How must the state benefit from the relationship in order for the court to find state action under this test?

4. What policy considerations argue on behalf of applying section 1983 and federal constitutional constraints to university officials in this case? Should administrators in private institutions generally be held to the same standard of civil rights liability as those in public institutions? What policy considerations would militate against such a uniformity of treatment?

5. May a state-related institution like Temple or Pitt claim Eleventh Amendment immunity from certain federal court lawsuits in the same way that a state institution may? See generally *LHE*, § 2.3.3., pp. 117-126.

6. Compare *Krynicky* with the case of *Albert v. Carovano*, 851 F.2d 561 (2nd Cir. 1988), discussed in *LHE* pp. 52-53. The college had suspended the student plaintiffs for violating its policy guide on freedom of expression and maintenance of public order -- a guide the college had promulgated in compliance with a New York law that requires colleges to adopt rules for maintaining public order on campus and file them with the state. The students claimed that the college's action suspending them was state action and that it violated the fourteenth amendment due process clause. The appellate court disagreed. Is its reasoning based on the symbiotic relationship, the nexus text, or neither?

7. Another approach to state action, not relied on in either *Krynicky* or *Albert*, is the "public function" test. For a description of this approach, see *LHE*, § 1.5.2., p. 48.

8. For another example of how an institution's funding sources and their proportion of the institution's budget can affect its status as a "public" or "private" institution, see *University of Vermont* and the state legislature's response (*LHE*, § 3.2.1, p. 170).

B.

CHAPTER II: THE COLLEGE AND TRUSTEES, ADMINISTRATORS, AND AGENTS

SEC. 2.3.1. Institutional Tort Liability.

Bradshaw v. Rawlings

612 F.2d 135 (3d Cir. 1979)

ALDISERT, Circuit Judge:

The major question for decision in this diversity case tried under Pennsylvania law is whether a college may be subject to tort liability for injuries sustained by one of its students involved in an automobile accident when the driver of the car was a fellow student who had become intoxicated at a class picnic. Another question relates to the liability of the distributor who furnished beer for the picnic which led to the intoxication of the driver. Still another question concerns the tort liability of the municipality where the plaintiffs injuries occurred.

The district court permitted the question of negligence to go to the jury against the college, the beer distributor and the municipality. From an adverse verdict of $ 1,108,067 each of the defendants has appealed, advancing separate arguments for reversal. The plaintiff has filed a conditional cross-appeal.[1]

I.

Donald Bradshaw, an eighteen year old student at Delaware Valley College, was severely injured on April 13, 1975 in Doylestown, Pennsylvania, while a backseat passenger in a Saab automobile driven by a fellow student, Bruce Rawlings.[2] Both were sophomores and had attended their class picnic at a grove owned by the Maennerchor Society on the outskirts of the borough.[3] Returning to the college from the picnic, Rawlings drove through Doylestown on Union Street. Union Street is colloquially known as "Dip Street" because it was constructed with drainage dips, instead of sewers, to carry surface water runoff. While proceeding through one of the dips, Rawlings lost control of the automobile which then struck a parked vehicle. As a result of the collision Bradshaw suffered a cervical fracture which caused quadriplegia.

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[1] For convenience we refer to the plaintiff in the singular although joining the injured plaintiff, Donald Bradshaw, were his mother and stepfather who recovered $ 5,000 each.

[2] Saab Motor Company, the manufacturer of the vehicle, and Gilbert Rawlings, the onwner of the vehicle, were originally named as defendants, but plaintiff voluntarily dismissed them.

The picnic, although not held on college grounds, was an annual activity of the sophomore class. A faculty member who served as sophomore class advisor participated with the class officers in planning the picnic and co-signed a check for class funds that was later used to purchase beer. The advisor did not attend the picnic, nor did he get another faculty member to attend in his place. Flyers announcing the picnic were prominently displayed across the campus. They were mimeographed by the college duplicating facility and featured drawings of beer mugs. Approximately seventy-five students attended the picnic and consumed six or seven half-kegs of beer. The beer was ordered from Marjorie Moyer, trading as Sunny Beverages, by the sophomore class president, who was underage.

The legal drinking age in Pennsylvania was, and is, twenty-one years, but the great majority of the students drinking at the picnic were sophomores of either nineteen or twenty years of age. Rawlings had been at the picnic for a number of hours. He testified that he had no recollection of what occurred from the time he left the picnic until after the accident. Bradshaw testified that Rawlings had been drinking and another witness, Warren Wylde, expressed his opinion that Rawlings was under the influence of alcohol when he left the picnic grove. That there was sufficient evidence on the question of Rawlings' intoxication to submit to the jury cannot be seriously questioned.

II.

On appeal, the college argues that Bradshaw failed to present sufficient evidence to establish that it owed him a duty for the breach of which it could be held liable in tort. The district court, apparently assuming that such a duty existed, submitted the question of the college's liability to the jury, stating:

> In any event, the college owes a duty to use due care under the circumstances to prevent an unreasonable risk of harm to sophomores who attend a class function. Restatement (Second) of Torts §§ 282 and 283 (1965) provide:

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[3] Although originally named as a defendant, the Maennerchor Society is not a party to this appeal.

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> § 282. Negligence Defined
>
> In the Restatement of this Subject, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful of an interest in others.
>
> § 283. Conduct of a Reasonable Man:
>
> The Standard
>
> Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.

Bradshaw v. Rawlings, 464 F. Supp. 175, 181 (E.D.Pa.1979). In its post-trial opinion, the district court attempted to justify this instruction by stating:

> I submitted this case to the jury on the above concept. The College was permitted to argue to the jury that it was not negligent because it was powerless to control the habits of college sophomores in regard to drinking beer. The jury rejected the College's defense that it acted in a reasonable manner under the circumstances. It should be noted that the College's liability is predicated on the concept of want of due care which a reasonable man would exercise under the circumstances. *Id.*

A

The college's argument strikes at the heart of tort law because a negligence claim must fail if based on circumstances for which the law imposes no duty of care on the defendant. "Negligence in the air, so to speak, will not do."[4] As Professor Prosser has emphasized, the statement that there is or is not a duty begs the essential question, which is whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." "Duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection."[5] Thus, we may perceive duty simply as an obligation to which the law will give recognition in order to require one person to conform to a particular standard of conduct with respect to another person.

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[4] F. Pollock, *Law of Torts* 468 (13th ed. 1929).

These abstract descriptions of duty cannot be helpful, however, unless they are directly related to the competing individual, public, and social interests implicated in any case. An interest is a social fact, factor, or phenomenon existing independently of the law which is reflected by a claim, demand, or desire that people seek to satisfy and that has been recognized as socially valid by authoritative decision makers in society.[6] Certainly, the plaintiff in this case possessed an important interest in remaining free from bodily injury, and thus the law protects his right to recover compensation from those who negligently cause him injury. The college, on the other hand, has an interest in the nature of its relationship with its adult students, as well as an interest in avoiding responsibilities that it is incapable of performing.

B

Our beginning point is a recognition that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. By constitutional amendment,[7] written[8] and unwritten law, and through the evolution of new customs, rights formerly possessed by college administrations have been transferred to students. College students today are no longer minors; they are now regarded as adults in almost every phase of community life. For example except for purposes of purchasing alcoholic beverages, eighteen-year-old persons are considered adults by the Commonwealth of Pennsylvania. They may vote, marry, make a will, qualify as a personal representative, serve as a guardian of the estate of a minor, wager at racetracks, register as a public accountant, practice veterinary medicine, qualify as a practical nurse, drive trucks, ambulances and other official fire vehicles, perform general fire-fighting duties, and qualify as a private detective. Pennsylvania has set eighteen as the age at which criminal acts are no longer treated as those of a juvenile, and eighteen-year-old students may waive their testimonial privilege protecting confidential statements to school personnel. Moreover, a person may join the Pennsylvania militia at an even younger age than eighteen and may hunt without adult supervision at age sixteen. [All footnote cites omitted.] As a result of these and other similar developments in our society, eighteen-year-old students are now identified with an expansive bundle of individual and social interests and possess discrete rights not held by college students from decades past. There was a time when college administrators and faculties assumed a role *in loco parentis*. Students were committed to their charge because the students were considered minors. A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights.[25] In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country. These movements, taking place almost simultaneously with legislation and case law lowering the age of majority, produced fundamental changes in our society. A dramatic reapportionment of responsibilities and social interests of general security took place. Regulation by the college of student life on and off campus has become limited. Adult students now demand and receive expanded rights of privacy in their college life including, for example, liberal, if not unlimited, partial visiting hours. College administrators no longer control the broad arena of general morals. At one time, exercising their rights and duties *in loco parentis*, colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives. Especially have they demanded and received satisfaction of their interest in self-assertion in both physical and mental activities, and have vindicated what may be called the interest in freedom of the individual will. In 1972 Justice Douglas summarized the change:

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[5] W. Prosser, *Law of Torts* 333 (3d ed. 1964).

[6] See, e.g., Pound, "A Survey of Social Interests," 57 *Harv. L. Rev.* 1; Llewwllyn, "A Realistic Jurisprudence: The Next Step," 30 *Colum. L. Rev.* 431, 441-47 (1930).

[7] Section one of the twenty-sixth amendment to the United States Constitution provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

[8] See, e.g., *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); *Papish v. Board of Curators*, 410 U.S. 667, 93 S. Ct. 1197, 35 L. Ed. 2d 618 (1973) (per curiam); *Healy v. James*, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *Tinker v. Des Moines School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

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[25] See generally *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *Healy v. James*, 408 U.S. 169, 171, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1971); See also *Report of the President's Commission on Campus Unrest* (1970); *Report of the American Bar Association Commission on Campus Government and Student Dissent* (1970); S. Kelman, *Push Comes to Shove: The Escalation of Student Protest* (1970); A. Adelson, *SDS* (4th ed. 1970).

> Students who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age are adults who are members of the college or university community. Their interests and concerns are often quite different from those of the faculty. They often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated.

Healy v. James, 408 U.S. 169, 197, 92 S. Ct. 2338, 2354, (1972) (Douglas, J., concurring).

Thus, for purposes of examining fundamental relationships that underlie tort liability, the competing interests of the student and of the institution of higher learning are much different today than they were in the past. At the risk of oversimplification, the change has occurred because society considers the modern college student an adult, not a child of tender years. It could be argued, although we need not decide here, that an educational institution possesses a different pattern of rights and responsibilities and retains more of the traditional custodial responsibilities when its students are all minors, as in an elementary school, or mostly minors, as in a high school. Under such circumstances, after weighing relevant competing interests, Pennsylvania might possibly impose on the institution certain duties of protection, for the breach of which a legal remedy would be available. See, e.g., *Chappel v. Franklin Pierce School District*, 71 Wash.2d 17, 426 P.2d 471 (1967); *McLeod v. Grant County School District*, 42 Wash.2d 316, 255 P.2d 360 (1953); Restatement (Second) of Torts § 320 (1965).[26] But here, because the circumstances show that the students have reached the age of majority and are capable of protecting their own self interests, we believe that the rule would be different.[27] We conclude, therefore, that in order to ascertain whether a specific duty of care extended from Delaware Valley College to its injured student, we must first identify and assess the competing individual and social interests associated with the parties.

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[26] § 320. Duty of Person Having Custody of Another to Control Conduct of Third Persons

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control.

III.

A

In the process of identifying the competing interests implicated in the student-college relationship, we note that the record in this case is not overly generous in identifying the interests possessed by the student, although it was Bradshaw's burden to prove the existence of a duty owed him by the college in order to establish a breach thereof. *Bradshaw* has concentrated on the school regulation imposing sanctions on the use of alcohol by students. The regulation states: "Possession or consumption of alcohol or malt beverages on the property of the College or at any College sponsored or related affair off campus will result in disciplinary action. The same rule will apply to every student regardless of age." *App*. at 726a-727a. We are not impressed that this regulation, in and of itself, is sufficient to place the college in a custodial relationship with its students for purposes of imposing a duty of protection in this case. We assume that the average student arrives on campus at the age of seventeen or eighteen, and that most students are under twenty-one during the better part of their college careers. A college regulation that essentially tracks a state law and prohibits conduct that to students under twenty-one is already prohibited by state law does not, in our view, indicate that the college voluntarily assumed a custodial relationship with its students so as to make operative the provisions of § 320 of the *Restatement (Second) of Torts*. See footnote 26, *Supra*.

Thus, we predict that the Pennsylvania courts would not hold that by promulgating this regulation the college had voluntarily taken custody of Bradshaw so as to deprive him of his normal power of self-protection or to subject him to association with persons likely to cause him harm. Absent proof of such a relationship, we do not believe that a prima facie case of custodial duty was established in order to submit the case to the jury on this theory.[28]

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[27] For example, Restatement (Second) of Torts § 315 (1965) states the general rule: There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

B

We next examine the facts adduced at trial to determine whether a special relationship existed as a matter of law, which would impose upon the college either a duty to control the conduct of a student operating a motor vehicle off campus or a duty to extend to a student a right of protection in transportation to and from off campus activities. We conclude that Bradshaw also failed to meet his burden of proving either of these duties. Bradshaw's primary argument is that the college had knowledge that its students would drink beer at the picnic, that this conduct violated a school regulation and state law, that it created a known probability of harm to third persons, and that knowledge by the college of this probable harm imposed a duty on the college either to control Rawling's conduct or to protect Bradshaw from possible harm.

Although we are aware of no Pennsylvania decision that has addressed this precise issue, the supreme court of that state has held that a private host who supplies intoxicants to a visibly intoxicated guest may not be held civilly liable for injuries to third parties caused by the intoxicated guest's negligence. *Manning v. Andy*, 454 Pa. 237, 310 A.2d 75 (1973). Only licensed persons engaged in the sale of intoxicants have been held civilly liable to injured parties, *Id.* at 239, 310 A.2d at 76 (citing *Jardine v. Upper Darby Lodge*, 413 Pa. 626, 198 A.2d 550 (1964)), and the source of this liability derives from the common law, *Corcoran v. McNeal,* 400 Pa. 14, 161 A.2d 367 (1960), as well as from a violation of Pennsylvania's Dram Shop statute, 47 P.S. § 4-493(1), *Majors v. Brodhead Hotel*, 416 Pa. 265, 205 A.2d 873 (1965). Because the Pennsylvania Supreme Court has been unwilling to find a special relationship on which to predicate a duty between a private host and his visibly intoxicated guest, we predict that it would be even less willing to find such a relationship between a college and its student under the circumstances of this case.

The centerpiece of Bradshaw's argument is that beer-drinking by underage college students, in itself, creates the special relationship on which to predicate liability and, furthermore, that the college has both the opportunity and the means of exercising control over beer drinking by students at an off campus gathering. These contentions miss the mark, however, because they blur the distinction between establishing the existence of a duty and proving the breach thereof. Bradshaw does not argue that beer drinking is generally regarded as a harm-producing act, for it cannot be seriously controverted that a goodly number of citizens indulge in this activity. Our national public policy, insofar as it is reflected by industry standards or by government regulation of certain types of radio-television advertising, permits advertising of beer at all times of the day and night even though Congress has banned advertisement of cigarettes[30] and the broadcasting industry has agreed to ban the advertisement of liquor.[31] What we know as men and women we must not forget as judges, and this panel of judges is able to bear witness to the fact that beer drinking by college students is a common experience. That this is true is not to suggest that reality always comports with state law and college rules. It does not. But the Pennsylvania law that prohibits sales to, and purchases by, persons under twenty-one years of age, is certainly not a universal practice in other countries,[32] nor even the general rule in North America.[33] Moreover in New Jersey, the bordering state from which the majority of Delaware Valley College students come, *App*. at 744a-746a, the legal drinking age is eighteen. Under these circumstances, we think it would be placing an impossible burden on the college to impose a duty in this case.

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[28] See *Hegel v. Langsam*, 29 Ohio Misc. 147, 273 N.E.2d 351, 55 Ohio Op.2d 476 (1971).

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[30] 15 U.S.C. § 1335.

[31] National Association of Broadcasters, *The Television Code* 11 (19th ed. 1976); National Association of Broadcasters, *The Radio Code* 14 (20th ed. 1976).

[32] For example, the legal age for drinking beer in Austria varies from state to state, ranging from fourteen to eighteen years; in Denmark, restaurants and hotels may not serve persons under eighteen; in England and Wales, a sixteen-year-old may purchase beer for consumption at a meal other than at a bar, otherwise the age requirement is eighteen; in France, minors less than sixteen years old may not enter bars unless accompanied by a parent or guardian, and must be eighteen in order to be served drinks stronger than beer or wine; in the Federal Republic of Germany, the legal age for drinking beer is sixteen and a juvenile over fourteen accompanied by an adult may buy or consume wine or beer in a public place; in Italy, the legal age is sixteen years; in the Netherlands, a hotel, restaurant or cafe may not sell beer to persons under sixteen but municipalities may prohibit by ordinance the sale to persons under twenty-one; in Norway, the legal age for drinking beer is eighteen, subject to the right of municipalities to impose tighter restrictions; in Sweden, the legal age is eighteen years; and in Switzerland, sixteen years. *Legal Drinking Age in the United Kingdom and Continental Europe* (November 1979) (Library of Congress Monograph, on file in the Library of the United States Court of Appeals for the Third Circuit, Pittsburgh Branch).

[33] Of the fifty states and the District of Columbia, only thirteen jurisdictions still retain the twenty-one year age requirement for the consumption of beer, while two require twenty years of age and nine, nineteen years. The remainder of the states permit beer drinking at age eighteen. *Information Please Almanc* 22 (1979).

None of the Canadian provinces or territories retain the twenty-one year age minimum. Seven place the legal drinking age at nineteen, and five at eighteen. *World Almanac* 136 (1979).

* * * *

Therefore, we conclude that Bradshaw failed to establish a prima facie case against the college that it should be charged with a duty of custodial care as a matter of law and that the district court erred by submitting the case to the jury.

* * * *

Notes and Questions

1. Could the college have better protected itself from potential liability in situations involving student activities and the consumption of alcohol? Would you suggest any changes in the college's written policies on alcohol? Any changes in enforcement of college alcohol policies? Any changes in the college's practices regarding supervision of student social functions?

2. Might the outcome of the case have differed if the picnic had occurred on a college field? In a residence hall? In a fraternity house? Regarding fraternities, consider the case of *Whitlock v. University of Denver*, discussed in *LHE*, sec. 2.3.1.1., p. 104, in which the Colorado Supreme Court refused to find that the university owed a duty to a student injured while using a trampoline owned by a fraternity. Compare *Whitlock* with *Furek v. University of Delaware*, discussed in *LHE*, sec. 4.12.1., pp. 536-537. Can you distinguish the cases sufficiently to justify the opposing outcomes? Do these cases stand for the proposition that an institution can avoid liability by severing all ties, including the application of student codes of conduct, with fraternities? Is such a policy legally advisable? Educationally advisable? Should it matter whether the fraternity house is on-campus on university land or off-campus on land owned by others? For an extended discussion of institutional liability for torts committed by sorority and fraternity members, see *LHE*, § 4.12.2., pp. 536-538.

3. While colleges and universities may escape liability for alcohol-related student injuries under certain circumstances, fraternity officers and others who procure liquor for or serve it to minors may be held liable for physical injuries to students involved subsequently in automobile accidents. See *Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150 (3d Cir. 1986). The Supreme Court of Missouri, however, denied liability in a similar case because the state legislature had not passed a social host statute. *Andres v. Alpha Kappa Lambda Fraternity*, 730 S.W. 2d 547(Mo. 1987). For a survey of state law on social host liability, see Special Project, "Social Host Liability for the Negligent Acts of Intoxicated Guests," 70 *Cornell L. Rev.* 1058 (1985).

4. Note the discussion in *Bradshaw* of the youth of most college students and the demise of *in loco parentis*, an issue also addressed in *Whitlock* (744 P.2d at 59-60), in *Mullins v. Pine Manor College* (*LHE*, § 4.17., pp. 584-585), and in *Nero v. Kansas State University*, Part II (D) of this Supplement (under sec. 4.17.). What implications do these matters have for risk management in higher education?

5. What types of actions or inactions of a college, and what types of circumstances, would serve to create legal duties to students? In regard to student consumption of alcohol? In regard to student social and recreational activities? In general? Compare *Bradshaw* and *Whitlock* with *Mullins v. Pine Manor College*, where the court held that a legal duty to the student had been created.

SEC. 2.3.1. Institutional Tort Liability.

Nero v. Kansas State University
861 P.2d 768 (Kan. 1993)

This case is reproduced in Part II (D) of this *Supplement* (under sec. 4.14.), along with questions regarding the institutional liability issues the case addresses.

SEC. 2.3.1. Institutional Tort Liability.

Beckman v. Dunn
419 A.2d 583 (Pa. 1980)

OPINION BY: PRICE

Appellant brought an action for defamation alleging that she had been libeled in a letter written by Professor Richard S. Dunn, Chairman of the department of history at the University of Pennsylvania. In a well-reasoned opinion, the Honorable Edward J. Blake granted appellees' motion for judgment on the pleadings based on his finding that the allegedly defamatory statements were incapable of defamatory meaning. We agree and affirm the order of the trial court.

To determine the propriety of awarding judgment on the pleadings, we must treat the motion as we would a preliminary objection in the nature of a demurrer, *Trost v. Clover*, 234 Pa.Super. 255, 338 A.2d 630 (1975), by accepting as true all well-pleaded averments of fact of the party against whom the motion is granted and considering against him only those facts that he specifically admits.

* * * *

Viewed in this fashion the pleadings in this case disclose the following facts. Appellant was a graduate student in the department of history at the University of Pennsylvania from 1964 to 1967. In her pursuit of a Ph.D. degree,she was required to pass a departmental comprehensive test. Appellant took an oral examination before a committee of three history department faculty members in September of 1966. The examining committee decided that her performance was inadequate and that the continuation of her studies was not merited. Appellant appealed this decision and was granted the opportunity to take a second examination, in writing. Once again, the examiners found her work inadequate.

From 1966 to December 31, 1969, appellant petitioned the university and the department in an effort to reverse the department's decision that she was ineligible to continue in the Ph.D. program. In February of 1968, she received a written notice from the University of Pennsylvania that it was the policy of the history department to allow to each student no more than two opportunities to pass the examination and that the department had voted unanimously to deny an exception to the rule in her case.

On May 7, 1976, nine years after her termination as a Ph.D. candidate, appellant wrote to Professor James O. Freedman, Ombudsman of the University, requesting that he reopen her case because of doubt about the circumstances under which she was denied the degree and that he impartially appraise it after investigation. Ombudsman Freedman responded by sending a copy of appellant's grievance to Professor Dunn, who, as well as being chairman of the history department, had been one of the examiners at both of appellant's examinations. By letter of June 7, 1976, Professor Dunn requested that the case not be reopened and gave a detailed review of the reasons that appellant failed to qualify for the degree. During the course of this discussion he made the following statements upon which the instant action is based:

> In the months following [the first] examination, Ms. Beckman spent far more time quarreling with our verdict, and seeking to overturn it, and fighting over the arrangements for a re-examination, than she did in making further preparations. Between September 1966 and February 1967, I find in our file, seven letters from her, fifteen letters concerning her case by graduate chairman, James C. Davis, and five letters from Provost David Goddard, who became involved in the case when Ms. Beckman and her mother appealed to him, as well as to University Trustee Robert L. Trescher about her mistreatment by the History Department. Eventually, a new examination was set up on terms meeting most of her demands....When, however, this examination took place, Ms. Beckman did generally worse than the first time. This was especially true in my case, since I had found her work passable the first time, but totally inadequate in the written exam. (Emphasis added to show allegedly defamatory language).

In summation, Professor Dunn wrote:

> Thus my department considered this case closed nine years ago. With Roy Nichols now dead, George Haskins not a member of our department, George Potter in England and Gaines Post in Texas, I think she has some gall to revive her old imputations against the integrity and standards of our department. It should be considered that Ms. Beckman did less than two years of graduate work in History at Penn from which she received an M.A. degree. Setting her examination aside, she was never considered one of the star students in our department. In the only departmental seminar that she took, from me, she did quite mediocre work and ended with a grade

> of B +. I have a horrid suspicion that if Ms. Beckman by hook or by crook can find an 'impartial' board to set aside the results of her two exams, she will then demand that she be granted the Ph.D. on the basis of the edition of Pennsylvania Laws, 1680-1700, that she has recently published. I hope that you can see any such outcome would be totally unacceptable to the Penn History Department. (Emphasis added to show allegedly defamatory language).

A libel is "a maliciously written or printed publication which tends to blacken a person's reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession." *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 441, 273 A.2d 899, 904 (1971); *Volomino v. Messenger Publishing Co.*, 410 Pa. 611, 613, 189 A.2d 873, 874-75 (1963). A communication is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him, *Cosgrove Studio and Camera Shop, Inc. v. Pane*, 408 Pa. 314, 182 A.2d 751 (1962), and necessarily involves the idea of disgrace. *Vitteck v. Washington Broadcasting Co.*, 256 Pa.Super. 427, 389 A.2d 1197 (1978). "'The test is the effect the [statement] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.'" *Corabi v. Curtis Publishing Co., supra* 441 Pa. at 447, 273 A.2d at 907, quoting, *Boyer v. Pitt Publishing Co.*, 324 Pa. 154, 157, 188 A. 203, 204 (1936). It is a matter of law for the court's determination whether the communication complained of can fairly and reasonably be construed to have the libelous meaning ascribed to it by the complaining party. *Bogash v. Elkins*, 405 Pa. 437, 176 A.2d 677 (1962); *Doman v. Rosner*, 246 Pa.Super. 616, 371 A.2d 1002 (1977). In its examination of the meaning of the communication, the court should read the allegedly defamatory words in context. *MacRae v. Afro-American Co.*, 172 F.Supp. 184 (E.D.Pa.1959), aff'd, 274 F.2d 287 (3d Cir. 1960); *Corabi v. Curtis Publishing Co., supra.*

Appellant contends that the trial court erred in determining that the statements were incapable of defamatory meaning. We disagree.

Since the nature of the audience hearing the remarks is a critical factor in considering whether a communication is capable of defamatory meaning, it is noteworthy that the statements called to our attention were made by Professor Dunn in response to Ombudsman Freedman's contact concerning reopening Ms. Beckman's case and were intended for his perusal. We have no indication that this was not confidential or was intended to be communicated to anyone outside the university administration. Thus, the intended audience is a limited one and not one, we believe, that would act to ostracize and shun Ms. Beckman as a result of these statements. Although the letter certainly might be sufficient to embarrass or annoy Ms. Beckman, that type of harm is not sufficient to be legally compensable. *Scott-Taylor, Inc. v. Stokes*, 425 Pa. 426, 229 A.2d 733 (1967); *Redding v. Carlton*, 223 Pa.Super. 136, 296 A.2d 880 (1972).[2]

The evaluation of an academic performance of this nature necessarily includes subjective elements that render statements, of the kind complained of here, akin to opinion. See *Keddie v. Pennsylvania State University*, 412 F.Supp. 1264 (M.D.Pa.1976). Opinion, without more, is not actionable as libel. *Bogash v. Elkins, supra*. The allegedly libeled party must demonstrate that the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion. *Restatement (Second) of Torts* § 566 (1976). Professor Dunn's letter clearly indicated that his evaluation of her academic abilities was based upon her failure to demonstrate a generalized knowledge of history because of the limited number of courses she had taken at Penn, inadequate preparation because of her employment during that time and continued bickering about her alleged mistreatment during the first exam, and her previous lackluster performance in his class. These facts are not defamatory, and thus, appellees will not be subject to liability for the statement of them or the opinion derived from them.

The statement that Ms. Beckman would act by "hook or by crook" is also obviously opinion since it is couched in the preface that this is Professor Dunn's "suspicion." Although appellant contends that this particular statement was intended to imply use of immoral or illegal means, this contention is disputed by the context of the statement. Professor Dunn's previous recitation of Ms. Beckman's actions of writing letters and soliciting others within the university administration to write about her mistreatment, and the nine-year delay in her action during which several members of the department had become unavailable, indicates that this is the foundation of his opinion. Thus, undisclosed defamatory facts concerning prior illegal or immoral activity may not reasonably be inferred from this phrase, and Professor Dunn's expression of his opinion is not actionable.

Furthermore, even if the communication were capable of defamatory meaning, we agree with appellees' claim that the publication was made on a conditionally privileged occasion relieving appellees of any liability. Under these circumstances, the complaining party bears the burden of proving abuse of the privilege, but we find as a matter of law that appellant has not alleged sufficient facts to demonstrate that she could produce evidence that, if believed, would be sufficient to prove an abuse of the conditional privilege.

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[2] Appellant disputes the conclusion that the communication does not create a legally recognizable harm by asserting that one whose scholarly reputation has been cast into doubt is unlikely to be employed by universities, to receive research grants, or to have one's literary efforts accepted by libraries and scholars. The complaint contains no allegations that the publication was intended or likely to be so wide. It is too late at this stage to raise this specter, and we find no facts to support it. The only doubt concerning her scholarly reputation that might arise in the academic community in general would result from appellant's failure to receive the Ph.D. degree, and not from the statement in Professor Dunn's letter. This circumstance is without redress through this action.

Communications made on a proper occasion, from a proper motive, in a proper manner, and based upon reasonable cause are privileged. *Baird v. Dun & Bradstreet, Inc.*, 446 Pa. 266, 285 A.2d 166 (1971); *Dempsky v. Double*, 386 Pa. 542, 126 A.2d 915 (1956).

> "'An occasion is conditionally privileged when the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that facts exist which another sharing such common interest is entitled to know.'" *Rankin v. Phillippe*, 206 Pa.Super. 27, 30, 211 A.2d 56, 58 (1965), quoting *Restatement of Torts* § 596 (1939).

Thus, proper occasions giving rise to a conditional privilege exist when: (1) some interest of the person who publishes defamatory matter is involved; (2) some interest of the person to whom the matter is published or some other third person is involved; or (3) a recognized interest of the public is involved. *Keddie v. Pennsylvania State University, supra; MacRae v. Afro-American Co., supra.*

Clearly, a proper occasion resulting in a conditional privilege was present in this case. An interest of Professor Dunn's was involved because his integrity was called into question by Ms. Beckman's letter impugning the fairness of the examination committee's decision on her case. An interest of Ombudsman Freedman, to whom publication was made, was also involved because it was his duty in fulfillment of his administrative office to investigate such grievances. Professor Dunn and Ombudsman Freedman, as members of the administration of the university, also have a strong common interest in the qualifications of those to be granted a degree from that university in order to maintain the standards and reputation of the institution.

Abuse of a conditional privilege is indicated when the publication is actuated by malice or negligence, *Baird v. Dun & Bradstreet, Inc., supra,* is made for a purpose other than that for which the privilege is given, *Rankin v. Phillippe, supra*, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, *id.*, or includes defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose. See Restatement (Second) Torts § 599 (1976). The pleadings fail to demonstrate as a matter of law that Professor Dunn's evaluation of appellant's academic skills resulted from intentional, reckless, or wanton conduct and was not a good faith judgment about her qualifications. His opinion of her academic abilities was reached after considerable exposure to her work and no lack of reasonable care or diligence in ascertaining its validity is indicated. See *Keddie v. Pennsylvania State University, supra*. The publication was not excessive in the scope of material communicated or the extent of circulation and was made for a proper purpose. Under these circumstances, the fact that the publication may have been inspired, in part, by resentment or indignation at the conduct of the person defamed does not constitute abuse of the privilege. *Rankin v. Phillippe, supra*. This communication was published in furtherance of important interests and was not wrongful. Therefore, it is entitled to protection.

In accord with the foregoing reasoning, we affirm the order of the court of common pleas.

Notes and Questions

1. Note the court's description of the tort of defamation. Does the letter, in whole or in part, meet the test on its face?

2. Under what circumstances does a conditional privilege against liability for defamation apply? What policy considerations support the privilege?

3. Might the court have ruled differently if Professor Dunn had circulated copies of his letter to the other faculty and the plaintiff's examination committee? If the letter had commented negatively on her conduct outside of class during her enrollment at the university? In any case, would the plaintiff have to show that the allegedly defamatory matter was false?

4. The court appears to characterize Professor Dunn's words as factual in part and as opinion derived from facts. The court then appears to characterize opinion as nondefamatory unless there are undisclosed defamatory facts which may be inferred from the opinion. For further analysis of the fact/opinion dichotomy, and its treatment by the U.S. Supreme Court, see *LHE*, § 2.4.1., pp. 130.

5. What advice would you give a professor faced with an Ombudsman or grievance proceeding similar to that in *Beckman*?

6. What steps can administrators and faculty take to reduce their exposure to defamation liability regarding recommendations and evaluations? Many attorneys advise their clients not to write letters of recommendation or to communicate any information about present or former employees or students. Do you agree with this advice? Why or why not?

SECS. 2.3 & 2.4. Institutional Liability for the Acts of Others
and
Personal Liability of Trustees, Administrators and Staff.

Problem 1

Margaret Moore is dean of the School of Nursing at New Brunswick State University (NBSU). She is routinely asked by students to provide letters of recommendation for potential employers, and she does so because she believes it is part of her professional responsibility to provide such letters for students.

Last year, a former student, Hilary Hall, withdrew voluntarily from the NBSU School of Nursing. Although Hilary was one of the top students in the nursing class, she dropped out of the nursing program after being accused by a fellow student of attempting to "pull the plug" of a respirator keeping alive a patient who, in Hilary's opinion, was "brain dead." No criminal charges were brought by the county prosecutor. Hilary was also suspected of slipping painkilling drugs to a terminally ill patient. Recently, Hilary has written to Dean Moore, advising her that she plans to apply to the school of nursing at a neighboring state's university and asking Dean Moore to provide her with a letter of recommendation.

Dean Moore isn't sure whether she should write the letter, or what she should say in it if she does.

1. What are the legal issues which Dean Moore should consider?

2. What professional responsibility or policy issues are involved, and how do they affect her decision?

3. Would the student have any legal claim of discriminatory treatment if Dean Moore refuses to write the letter for her, but has written such letters for many other students applying to nursing programs at other schools?

SEC. 2.4.3. Personal Liability for Violations of Federal Constitutional Rights.

Endress v. Brookdale Community College

144 N.J. Super. 109; 364 A.2d 1080 (App. Div. 1976)

The opinion of the court was delivered by Seidman, J.A.D.

These consolidated appeals are from a judgment in favor of plaintiff reinstating her as a member of the faculty of defendant college with back pay and other benefits, and awarding her damages, both compensatory and punitive, plus counsel fees and costs.

I

On June 27, 1974 plaintiff Patricia H. Endress, an Assistant Professor of Journalism at Brookdale Community College, a public institution of higher learning located in Lincroft, Monmouth County, was discharged from her employment and her contract for the next academic year was rescinded[1] by resolution adopted by the college board of trustees upon the recommendation of the president.

The controversy which led to Professor Endress' dismissal and this litigation had its origin in an editorial written by her which appeared in the April 26, 1974 edition of *The Stall*, the student newspaper of which she was the faculty advisor. In substance, it accused the chairman of the board of trustees of a conflict of interest in allegedly making "a deal" whereby his nephew's company received a contract from the college for the furnishing of audio-visual equipment. An accompanying article on the same subject was written by her assistant, a "journalism intern."

In recommending the dismissal to the board of trustees the president of the college asserted as the alleged causes for such action plaintiff's violation of "both the tradition established under Board policy, and the philosophical platform and goals of the College as the same pertain to freedom of the press and student responsibility for the college newspapers," and of the "editorial prerogatives of the student editor and the student staff," in ordering and directing the editor of the newspaper "to publish certain material without his approval," and in causing the publication of "libelous matter contrary to accepted journalistic standards."

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[1] Plaintiff's existing contract would have expired June 30, 1974. The rescinded contract, which would have given her tenure, was for the period July 1, 1974 - June 30, 1975.

Professor Endress thereupon filed a multi-count complaint, in which the Brookdale Community College Faculty Association joined as plaintiff,[2] against the college; and also, in both their official and individual capacities, against W.P. Corderman, chairman of the board of trustees; Donald H. Smith, president of the college, and the other members of the board of trustees. The complaint charged, among other things, that her employment had been wrongfully terminated, that Corderman and Smith had wrongfully and maliciously interfered with her existing contractual relationship, and that they had conspired among themselves and the other board members to breach that contract; that Smith and the members of the board of trustees had libeled her by the publication of a letter charging her with violating her duties and responsibilities,[3] and that she was discharged solely by reason of her exercise of her constitutional right of "freedom of the press, association and speech."

Defendants contended generally that the discharge of Professor Endress and the rescission of her new contract were (we quote from the oral decision of the trial judge) "all due and proper actions incumbent upon them in the exercise of their duties in their respective capacities, were in no way arbitrary, capricious or conspiratorial, and that the action did not breach any of their respective contractual obligations [with plaintiff]." President Smith asserted, additionally, that he had determined that Professor Endress had violated her duties and obligations as a member of the faculty and as advisor to the college newspaper, and, in accord with his duties and responsibilities, had recommended to the board of trustees the termination of her employment. He denied the existence of any conspiracy, as did Corderman, who also contended that he was not present at the June meeting of the board of trustees and did not participate in the action taken. Leon Zuckerman, one of the trustees, also disclaimed individual responsibility for the action of the board, in that he was absent at the time. Another board member, Joseph E. Clayton, contended that although he attended the board meeting he did not vote affirmatively for the termination and therefore could not be held liable therefor.

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[2] At the close of the trial, judgment was entered in favor of defendants and against the Association. A third plaintiff, New Jersey Education Association, voluntarily withdrew as a party to the action, and an order was entered dismissing with prejudice all claims asserted by it.

[3] It appears that the counts in the complaint alleging libel were settled prior to trial. Counsel for appellants Clark et al. moved, among other things, for leave to file a supplemental appendix and include therein a copy of the release executed by plaintiff, but which was not placed in evidence at the trial. We granted the motion with the proviso that plaintiff's objection thereto "shall be deemed a motion to strike the same," and we reserved decision on that motion until oral argument. Since no issue was raised below with respect to the effect of the settlement and release upon any of the remaining claims, we deem it inappropriate to give any consideration to the matter at this time except as it may affect the quantum of damages awarded. This will be dealt with later herein.

At the conclusion of the trial, the judge below, sitting without a jury, entered the following judgment:

> [The College was ordered to pay Endress $14,121.00 in back pay; to forward all pension or retirement contributions to which she was entitled for the next contract year; to extend her a contract for the academic year subsequent to that contract year; and to give her whatever salary increases she would have received had she not been terminated. The president and the trustees who voted for her termination were ordered to pay Endress $10,000 in compensatory damages (jointly and severally) and $10,000 in punitive damages (each). Judgment was entered in favor of three trustees who had not attended the meeting at which the vote was taken.]

* * * *

The grounds of appeal asserted by Brookdale Community College are that (1) the "termination of the plaintiff, Patricia H. Endress, did not violate any constitutionally protected right," (2) just cause existed for the termination, and (3) specific performance of plaintiff's contract of employment cannot be adjudged. President Smith contends that (1) there was no "legal issue resolved by the court imposing any responsibility" upon him, (2) the assessment against him of additional damages in the event of appellate reversal was without validity, and (3) he "acted in good faith upon facts he believed to be true in the exercise of his discretion and judgment" in recommending the dismissal of plaintiff.

* * * *

Appellant trustees raise as issues alleged error on the part of the trial judge in awarding (1) "compensatory relief" against them, (2) damages "for a violation of plaintiff's right of due process," (3) punitive damages, and (4) "attorney's fees in an action brought under 42 U.S.C. § 1983"; and also in not giving credit for the amount of the settlement. (See footnote 3).

* * * *

The Departments of Education and Higher Education of the State of New Jersey, in an *amici curiae* brief filed on their behalf by the Attorney General, complain of the failure of the trial judge "adequately to explain the reasons for the awarding of substantial damages against the trustees of a public educational institution." They argue that because such awards "will necessarily have a powerful and undesirable impact upon the State educational system," it is important that they "clearly reflect the application of established legal principles to specific articulated findings of fact."

* * * *

II

Professor Endress had been advisor to the school newspaper, which was also utilized as a training program for journalism students, from the time she came to work for the college in September 1971. She testified at the trial that she sought to have her students pursue an investigative reporting approach to journalism. While student copy was submitted to her, she had no censorship role and exercised no editorial veto. The student editors were fully responsible for that which was published. Explaining that they were always short staffed, she said that she had written an earlier editorial, as well as two articles, but, she added, she never wrote anything over the objections of the editor and, further, she had never been specifically forbidden by the college administration to write editorials or articles for the newspaper.

It appears that in August 1973, as the result of rumors circulating about the campus concerning several contracts awarded by the college, including the one involving Corderman's nephew, Professor Endress and her assistant thought that an investigation of the matter would be good experience for the students. Accordingly, the project was undertaken in consultation with the editorial staff. Several students were assigned to the investigation and articles on the subject were published.

Professor Endress said that because the student editor-in-chief and other members of the staff were either too busy to write an editorial on the subject, which she considered appropriate, or "did not know what to say," she undertook to prepare the one in question and submitted it, together with the article, to the editor-in-chief, who expressed no opposition to either.

* * * *

Thereafter, except for the semi-annual faculty evaluation report issued by her superior early in June, which was generally favorable except for the comment that "as advisor of the student newspaper, [she] must resist dominating the editorial policy of the paper * * *," and to which she responded that she would address herself to the comment upon her return for the summer session, she had no other contact with the administration concerning the matter until she learned of her dismissal when she came back from her vacation.

A former student managing editor of the newspaper, who had approved both the article and the editorial in question, testified that she had never been ordered to publish them or subjected to any pressure or coercion.

* * * *

President Smith's version of the events was that after he read the April 26 edition of the newspaper he asked Dr. Circle and Dr. John F. Gallagher, vice-president for academic affairs, to conduct an investigation. Their reports convinced him that the article and editorial had not been written by students, as the initial inquiries had indicated, but by "Miss Endress or Mr. Karey [her assistant] or both," and he "asked for verification of the statement made to Dr. Circle by the editor-in-chief, Mr. McGee," and a written statement was obtained from him. He reported to the board of trustees at their May meeting the results of the investigation and reviewed "the implication of the fact that it seemed to be clear that the article and editorial had been written not by students but by staff," but he made no recommendation at that time.

On June 7, following additional discussions with board members, President Smith attempted to make contact with plaintiff but was unable to do so because of her absence on vacation.

Decisive action was taken on June 27. President Smith formally recommended to the board the dismissal of plaintiff and the rescission of the new contract for the reasons summarized earlier herein. The board accepted the recommendation and adopted an accordant resolution.

III

In his oral opinion issued at the close of the evidence, the trial judge addressed himself first to the issue of whether the board of trustees had just cause to terminate plaintiff's employment under the contract expiring June 30, 1974, and to rescind the new contract.

The trial judge found that the student editors had approved the use of the article and editorial and that neither plaintiff nor her assistant had ordered their publication.

C3

* * * *

He rejected the first reason given for plaintiff's discharge, namely, that she had violated her duties and responsibilities as a journalism teacher and advisor to the newspaper by ordering the publication of the article and editorial. Further, he said, even if plaintiff had caused the material to be published without the editor's permission, she would have been subject to severe reprimand, but not to dismissal.

As for the second reason given for dismissal, that the material was allegedly libelous, the trial judge found that the "[d]efendants have failed to establish that the editorial was written with malice or with reckless disregard to its truth," and that, essentially, it was based on the article. Cf. *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

The trial judge found, further, that the real reason for plaintiff's dismissal was not dissatisfaction with her services but, rather, "the incorrect feeling that she had libeled Corderman." He said that the written recommendation President Smith had received from Dr. Gallagher for termination "was gotten merely for show -- to build the case against Endress." Smith, he said, "had already made up his mind." He added that, with the exception of Corderman, "I was strictly unimpressed with the testimony of the Brookdale employees. None of it holds up. It is all tailored to support the termination." He put "little stock in any of Smith's testimony."

The conclusions reached were that just cause did not exist for the board's action, and that the dismissal and the termination of the 1974-1975 contract were illegal.

* * * *

We discern no sound basis for disturbing the holding below that just cause did not exist for dismissing plaintiff from her employment or for rescinding the 1974-1975 contract.

* * * *

V

We turn to the determination below that the individual defendants (excluding the three who were exonerated) had deprived plaintiff of her constitutional rights in violation of 42 U.S.C. § 1983, and the assessment of compensatory damages against them jointly and severally in the sum of $10,000, and of punitive damages against each in the sum of $10,000, plus a counsel fee of $10,000.

The cited section of the Federal Code is derived from the Civil Rights Act of 1871 and provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Although neither the pleadings nor the pretrial order specifically refers to this statute, the 12th count of the complaint clearly invokes it by charging these defendants, "[a]cting under color of the authority conferred upon them by the law of the State of New Jersey, specifically N.J.S.A. 18A:64A-1 et seq.," with adopting and enforcing a policy "which constitutes a violation of the specific civil and property rights of the plaintiff, without due process of law," and with stripping plaintiff of "her academic rank and academic title, and of the status of tenure" pursuant to "this policy of suppressing free speech." These allegations satisfy the requirement that to state a claim under § 1983 a plaintiff must allege deprivation of a constitutional right done under color of state law....

It is not a matter of dispute that the individual defendants here were acting under color of state law, since the college is a public educational institution established by authority of N.J.S.A. 18A:64-1 through 29. See N.J.A.C. 9:4-1.1. And it is also to be noted that state courts have concurrent jurisdiction with federal courts over civil rights actions. *Long v. District of Columbia*, 152 U.S. App. D.C. 187, 469 F.2d 927, 937 (D.C. Cir. 1972); cf. *Gray v. Serruto Builders, Inc.*, 110 N.J. Super. 297, 301 (Ch. Div. 1970)....

In order for us intelligently and fairly to appraise the trial judge's disposition of the civil rights phase of the case, a review of the applicable principles of law is in order.

* * * *

More in point is the recent case of *Wood v. Strickland*, 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975), which considered the matter of good-faith immunity as it applied to school administrators and school board members and sought to resolve differing concepts in the lower federal courts of the nature of the immunity in such cases. Observing that liability for every action found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would unfairly impose upon the school decision maker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties, the court explained:

> We think there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that actions taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity [at 321, 95 S. Ct. at 1000].

The court said further that the applicable standard of good faith involves both "objective" and "subjective" elements. Thus, while the official must act sincerely and with a belief that he is doing right, ignorance or disregard of settled, indisputable law resulting in a violation of a student's constitutional rights cannot be justified. *Id.* at 321, 95 S. Ct. 992:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student...[at 322, 95 S. Ct. at 1001].

Although *Wood v. Strickland* dealt with the individual responsibility of school board members for disciplinary proceedings against students, the immunity standards there discussed are equally applicable to situations, such as the one under review, involving the conduct of administrators and trustees of public institutions of higher learning affecting the rights of faculty members....

B

With the foregoing principles and standards in mind, we proceed to a scrutiny of the trial judge's resolution of the issues, a task made more onerous by a regrettable absence of meaningful findings of fact in several critical areas.

* * * *

The burden was on plaintiff to prove that her discharge from employment was predicated at least in part on her exercise of First Amendment rights. *See Roseman v. Indiana*, 520 F.2d 1364, 1367 (3 Cir. 1975), cert. den. 424 U.S. 921, 96 S. Ct. 1128, 47 L. Ed. 2d 329 (1976); *Connealy v. Walsh*, 412 F. Supp. 146, 154 (W.D. Mo. 1976). She carried that burden. The trial judge here correctly held that plaintiff's comments in the editorial were protected by the First Amendment. And we are also satisfied of the soundness of his conclusion that the decision "not to rehire her was precipitated by the exercise of her First Amendment rights." But while these holdings, quite apart from the due process issue, which pertained to plaintiff's complaint that she was not accorded a hearing on the termination of her employment, amply supported the relief encompassed within paragraphs one through four of the judgment, they would not necessarily entitle plaintiff to prevail in her § 1983 action against the individually named defendants. This is so because of their right to interpose a qualified immunity from damages.

It should be noted, however, that once plaintiff established a prima facie right to damages, it then became incumbent upon defendants to seek the shield of immunity. The qualified immunity available to them under *Wood v. Strickland, supra*, is an affirmative defense on the merits which must be alleged in the pleadings and factually proven by the one asserting it. *Zeller v. Donegal School Dist. Bd. of Ed.*, 517 F.2d 600, 612 (3 Cir. 1975). The defense of immunity is not spelled out either in the answers filed by these defendants or in the pretrial order as they appear in the joint appendix, an omission probably accounted for because *Wood v. Strickland* had not yet been decided. It seems to have been raised at trial, however, since the trial judge states in his opinion that "[d]efendants contend that they are immune from liability under Section 1983." We shall consider the defense as properly in the case.

The trial judge, applying the standard of *Wood v. Strickland*, concluded that "it is clear that defendants, in recommending and voting to terminate plaintiff Endress should have known that their action in adopting the resolution violated Endress' constitutional rights." But the conclusion reached is buttressed neither by supporting factual findings nor by a sufficient consideration of the guidelines in *Wood v. Strickland*. It was an over-simplification of the problem for the trial judge to say that unless plaintiff's employment was terminated for the alleged abuse of her position as faculty advisor or unless defendants proved that she had knowingly or recklessly made false statements with regard to the board chairman, "the defendants did violate Endress' First Amendment rights by adopting the June 27, 1974 resolution terminating her employment * * *."

There should have been a consideration of the objective and subjective criteria of good faith mandated by *Wood v. Strickland*; that is, the subjective aspect of whether the official acted sincerely and with a belief that he was doing right, and not with the malicious intention to cause a deprivation of constitutional rights; and, if that test was met, the objective standard of whether the official knew or reasonably should have known that his act would violate the clearly established constitutional rights of plaintiff....

Nevertheless, our independent review of the record satisfies us that the conclusion reached was correct, at least with respect to the abridgement of plaintiff's First Amendment rights. It is not open to question, nor was it at the time of these events, that activities connected with the publication of a student newspaper are within the protection of that provision of the United States Constitution. See *Papish v. University of Missouri*, 410 U.S. 667, 93 S. Ct. 1197, 35 L. Ed. 2d 618 (1973); *Bertot v. School District No. 1, Albany County, Wyo.*, 522 F.2d 1171, 1183 (10 Cir. 1975). Plaintiff was not excluded because of her position as faculty advisor. In fact, defendants' own expert acknowledged that a faculty advisor who wrote an editorial for a student publication would be entitled to First Amendment protection. There is, moreover, no proof in this case that her activities led to a material or substantial disruption of class work or to substantial disorder or the invasion of the rights of others. *Id.* at 1183....We perceive no countervailing public interest here which would justify a restriction of plaintiff's First Amendment activity. See *Pickering v. Board of Education, supra*, 391 U.S. at 568, 88 S. Ct. 1731.

We are quite willing to credit each of the individual defendants with acting sincerely and with the belief that he or she was doing right, and without any malicious intent to cause a deprivation of constitutional rights. We thus accord to each the benefit of the subjective criterion of good faith, despite the failure of these defendants (excepting President Smith) to testify. Even so, lack of intent on their part to violate plaintiff's constitutional rights would not necessarily be a defense if they should reasonably have known that their conduct would have that effect. *Hennings v. Grafton*, 523 F.2d 861, 864 (7 Cir. 1975); *Chaudoin v. Atkinson, supra,* 406 F. Supp. at 35.

In the case of President Smith we have already expressed our concurrence in the trial judge's appraisal of his conduct. We have no doubt that plaintiff's writing of an editorial critical of the chairman of the board of trustees prompted Smith to embark upon the course of action which ultimately led to his recommendation that she be discharged. Applying the objective criterion of *Wood v. Strickland*, he must be held to a standard of conduct based upon knowledge of the basic, unquestioned rights of plaintiff. We are thoroughly satisfied that he reasonably should have known that the action he took would cause a deprivation of plaintiff's First Amendment rights.

But we do not believe the record would support the conclusion that the trustees were similarly motivated in adopting the resolution of June 27, 1974. It has not been demonstrated that they acted for reasons other than those enumerated in the president's recommendation, and those, it is to be noted, were couched in terms of plaintiff's failure properly to perform her duties as faculty advisor to the student newspaper.

However, they are nonetheless not to be excused if the effect of their action was to abridge plaintiff's exercise of her First Amendment rights and they reasonably should have known that such would be the result, for they, too, were chargeable with knowledge of plaintiff's basic, unquestioned constitutional rights. The record establishes that the trustees were clearly aware of the editorial and the resulting furor. The conclusion is inescapable that no matter how the reasons for the discharge may have been worded, the "underpinning throughout was primarily [plaintiff's] acts in connection with the newspaper." Cf. *Bertot v. School District No. 1, Albany County, Wyoming, supra* at 1183.

The point to be stressed is that careless disregard or negligent ignorance of clear, well-established constitutional rights will not insulate these defendants from liability. Cf. *Knell v. Bensinger*, 522 F.2d 720, 725 (7 Cir. 1975).

We do not reach a like result with respect to plaintiff's further complaint that as she was not accorded a hearing with respect to the termination of her employment, she was denied due process of law and thus deprived of another constitutional right.

* * * *

While plaintiff was not served with a formal statement of charges, she was fully apprised of the reasons for her termination set forth in the resolution and accompanying document, copies of which were sent to her. It is not in dispute that she did not at any time request an opportunity to be heard.

For our purposes we need not resolve at this time the substantial issue of whether, on the facts here present, plaintiff was entitled to a hearing, either pre- or post-termination, as a matter of constitutional right. As we have said, in a § 1983 action the applicable standard laid down in *Wood v. Strickland* for determining the personal liability of individual defendants is whether they disregarded a "basic, unquestioned constitutional right" of plaintiff. Our examination of the cases on the subject, beginning with *Roth* and *Perry*, leads us to the conclusion that the test has not been met. Even now there is a continuing judicial debate over what constitutes a "liberty" or "property" interest sufficient to entitle one to a constitutional right of procedural due process. See *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); 2d 684 (1976); *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976); *Weathers v. West Yuma County School Dist. R-J-1*, 530

F.2d 1335 (10 Cir. 1976); *Connealy v. Walsh, supra; Morris v. Laurel School District Bd. of Ed.*, 401 F. Supp. 188 (D. Del. 1975). It must be remembered that it is the state of the law with respect to procedural due process at the time of the action taken which governs on the issue of the immunity of the individual defendants. *Hostrop v. Bd. of Jr. College Dist. No. 515, supra*, 523 F.2d at 578. We are satisfied that the law on the subject was such in 1974 that it cannot be said the individual defendants reasonably should have known then that their action would violate a clearly established constitutional right of plaintiff to procedural due process; i.e., the right to a hearing.

C

The trial judge entered judgment against the president of the college and all the trustees except Zuckerman, Corderman and Clayton, for both compensatory and punitive damages. The compensatory award was against them jointly and severally in the sum of $10,000.

* * * *

[W]e encounter no difficulty in concluding, for reasons expressed earlier herein, that plaintiff was entitled to compensatory damages against these defendants because of the deprivation of her First Amendment rights. See *Basista v. Weir*, 340 F.2d 74, 85-88 (3 Cir. 1965). The further issue confronting us is whether the amount awarded was justified by the evidence, bearing in mind that an award of damages is left to the sound discretion of the trier of the fact; i.e., discretion based upon proof of supportive facts and circumstances. *Manfredonia v. Barry*, 401 F. Supp. 762, 770 (E.D.N.Y. 1975).

* * * *

From our independent review of the record, taking into account the absence of proof of any significant emotional effect upon plaintiff as the result of the action taken and considering the factors referred to above, we are of the view that the sum of $2500 will fairly and adequately compensate her for the deprivation of her civil rights. The award is modified accordingly.

D

On the subject of the punitive damage award of $10,000 against each of the individual defendants conceived, the trial judge's explanation was limited to the comment that "[p]unitive damages are absolutely necessary to impress upon the people who are in authority and other people in authority that an employee's constitutional rights may not be infringed."

An award of punitive damages, also termed exemplary damages, is discretionary and not a matter of right. * * * * While each case must be governed by its own facts, the generally recognized factors are "(1) actual malice, which is nothing more or less than intentional wrongdoing -- an evil-minded act; or (2) an act accompanied by a wanton and willful disregard of the rights of another." *La Bruno v. Lawrence*, 64 N.J. Super. 570, 575 (App. Div. 1960), certif. den. 34 N.J. 323 (1961).

In the context of a § 1983 action, punitive damages are recoverable provided there is a finding that the conduct of the public official "manifests a reckless indifference to the property rights of others, ill will, a desire to injure or malice." *Silver v. Cormier*, 529 F.2d 161, 163 (10 Cir. 1976).

* * * *

As to the individual defendants, other than the college president, the record is devoid of any findings whatever to support either the award of such damages or the amount thereof. There is, moreover, nothing in the record which even remotely suggests that the trustees acted maliciously or with a wanton and willful disregard of plaintiff's rights. The most that can be said about them is that they reasonably should have known that their action violated plaintiff's constitutional right. This is not enough to warrant the infliction of punitive damages. The award against them is accordingly vacated.

Not so, however, with respect to President Smith. There is enough to support an award against him, although the record does not contain specific findings pointing directly to the issue of punitive damages. The amount thereof is another matter. Allowing for the somewhat disjointed nature of the opinion below, it is clear from a reading of it in its entirety that the trial judge found malice in the conduct of President Smith toward plaintiff, and that this finding could reasonably have been reached on sufficient credible evidence in the record. *State v. Johnson, supra*, 42 N.J. at 162. We extract these remarks: "Smith had already made up his mind. On June 7th he had decided on termination and then reached out for written support." "I find that he [Dr. Gallagher] was ordered by Smith to write the recommendation for termination * * *. It is perfectly clear that Smith wanted written support for his decision to recommend termination." Though in the specific context of plaintiff's additional assertion of a tortious interference with her contractual relation, but pertinent as well to the § 1983 claim, the trial judge said, further, that "[i]n the present case plaintiff Endress has not demonstrated that Corderman acted with malice. Smith however, did. It is perfectly clear that Smith from April 26th, 1974 on embarked upon a campaign of getting the evidence that would justify the termination of Endress."

But we conclude, after a careful review of the record, and with appropriate awareness of the discretion of the trial judge in such matters, that an award of $10,000 in the circumstances here present is so disproportionate to the injury suffered by plaintiff from the violation of her constitutional rights that it must have resulted from mistake on the part of the trial judge, particularly in the absence of any explanation by him of why he considered that amount to be fair and reasonable. We are convinced that the sum of $2500 as punitive damages in the case of President Smith is a sufficient penalty to impose upon him for his wrongful conduct and as a deterrent against such action in the future. The award is reduced accordingly.

Notes and Questions

1. Note the court's reliance on the U.S. Supreme Court's opinion in *Wood v. Strickland*, 420 U.S. 308 (1975). In a later opinion (*Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982)), the Supreme Court limited its *Wood* holding by, in effect, deleting the "subjective" or "good faith" test for immunity and focusing only on the"objective" or "reasonably should have known" test; see *LHE*, § 2.4.3., pp. 133-134.

2. Is there any basis on which the community college itself (as distinct from its trustees and officers as individuals) could have claimed immunity from suit? If the plaintiff had filed suit in federal court? See *LHE* § 2.3.3.

3. In June 1989 the U.S. Supreme Court ruled that neither state agencies nor state officials are "persons" for the purposes of Section 1983. *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304 (1989). County and municipal agencies and their officers, however, are "persons"

for purposes of Section 1983 liability (see *LHE* § 2.3.3.). After *Will*, could the community college make a convincing argument that it and its officers are immune from Section 1983 liability? Brookdale is a county community college that receives a portion of its budget from the state.

4. For background on the First Amendment aspects of the *Endress* case, see *LHE* §§ 3.7.4., 3.7.6., 4.13.1., 4.13.3., and 4.13.4. For background on the procedural due process issues, see *LHE* § 3.6.2.

SECS. 2.3. 2.4, 2.5. Institutional Liability for the Acts of Others, Personal Liability of Trustees, Administrators, and Staff, and *Institutional Management of Liability Risk.*

Problem 2[*]

The Student Government Association (S.G.A.) is a recognized student organization at Anonymous University. It receives an allotment of money from the University to fund other student organizations on campus.

In recent years, the S.G.A. has operated various businesses in the University Student Center, all of which are student-managed and student-funded. The S.G.A. runs a Snack Shop, a Convenience Store, and a Used Book Store. All three businesses utilize the University Purchasing Office and Payroll Office and pay rent to the university for use of Student Center space.

Since the student body enjoys traveling but is not affluent, students are constantly looking for travel bargains and charters. The S.G.A. President decided that a travel agency business should be started on campus to fill this need. He requested and received written permission from the Dean of Students and the S.G.A. Board of Directors to rent space in the Student Center for this purpose. Because of the need for computer tie-ins with airlines and other services, as well as the need to have various licenses and permits from government agencies, the S.G.A. President decided to contract with an existing travel agency to establish a campus branch, instead of having a student-run travel service. The S.G.A. President entered into a contract with Travel-Cade, a travel agency based in the same city as the university. Travel-Cade agreed to pay the S.G.A. a percentage of its gross sales and hold all licenses and permits required by law.

Two weeks later, the University Chancellor learned of the agreement and was furious. She called the S.G.A. President to her office and stated that the S.G.A. had no business entering into an agreement with an outside company, particularly since Frank Cade, President of Travel-Cade, had ties to organized crime. The Chancellor sent a letter to Mr. Cade stating that the University could not honor the agreement because the S.G.A. President was not authorized to sign a contract as an agent of the University.

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[*] With thanks to Dr. James Brooks, Dean of Students at William Mitchell School of Law, who drafted the original problem upon which this problem is based.

The S.G.A. President, upset by the whole incident, talked to a campus newspaper reporter and described his meeting with the Chancellor. The next edition of the campus newspaper carried a banner headline:

TRAVEL AGENCY CLOSED BY CHANCELLOR:
CADE IS A CROOK

The story detailed the meeting and the statements made by the Chancellor. A few weeks later, Mr. Cade filed suit against the University, the Chancellor, the Student Government Association President, and the Editor of the campus newspaper. He alleged both breach of contract and defamation.

1. If this is a private university, what legal issues would likely arise in the course of this lawsuit, and what facts would you need to have in order to resolve these issues?

2. If this were a public university, what new or different legal issues would likely arise in the course of this lawsuit that would not likely arise, or would not arise in the same way, if the university were private?

3. What preventive law measures, if any, would you suggest in order to prevent this type of problem from arising again (see *LHE* § 1.7.2.)?

C.

CHAPTER III: THE COLLEGE AND THE FACULTY

SEC. 3.2.2. Organization, Recognition, and Certification.

Lehnert v. Ferris Faculty Association
500 U.S. 507; 111 S. Ct. 1950 (1991)

JUSTICE BLACKMUN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III-B, III-C, IV-B (except for the final paragraph), IV-D, IV-E, and IV-F, and an opinion with respect to Parts III-A and IV-A, the final paragraph of Part IV-B, and Parts IV-C and V, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE STEVENS join.

This case presents issues concerning the constitutional limitations, if any, upon the payment, required as a condition of employment, of dues by a nonmember to a union in the public sector.

I

Michigan's Public Employment Relations Act (Act), Mich. Comp. Laws § 423.201 et seq. (1978), provides that a duly selected union shall serve as the exclusive collective-bargaining representative of public employees in a particular bargaining unit.[2] The Act, which applies to faculty members of a public educational institution in Michigan, permits a union and a government employer to enter into an "agency-shop" arrangement under which employees within the bargaining unit who decline to become members of the union are compelled to pay a "service fee" to the union.[3]

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[2] The statute provides:

> "Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representative of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer...." Mich. Comp. Laws § 423.211 (1978).

Respondent Ferris Faculty Association (FFA), an affiliate of the Michigan Education Association (MEA) and the National Education Association (NEA), serves, pursuant to this provision, as the exclusive bargaining representative of the faculty of Ferris State College in Big Rapids, Mich. Ferris is a public institution established under the Michigan Constitution and is funded by the State. See Mich. Const., Art. VIII, § 4 Since 1975, the FFA and Ferris have entered into successive collective-bargaining agreements containing agency-shop provisions. Those agreements were the fruit of negotiations between the FFA and respondent Board of Control, the governing body of Ferris. See Mich. Comp. Law § 390.802 (1988).

Subsequent to this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977), in which the Court upheld the constitutionality of the Michigan agency-shop provision and outlined permissible uses of the compelled fee by public-employee unions, Ferris proposed, and the FFA agreed to, the agency-shop arrangement at issue here. That agreement required all employees in the bargaining unit who did not belong to the FFA to pay a service fee equivalent to the amount of dues required of a union member.[4] Of the $ 284

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[3] The statute reads:

> "[N]othing in this act or any in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 [§ 423.211] to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative...." § 423.210.

[4] The agency-shop provision of the collective-bargaining agreement for 1981-1984 provided in pertinent part:

> "A. Each employee covered by the negotiated Agreement between the Board of Control of Ferris State College and the Ferris Faculty Association (Dated November 19, 1981) shall, as a condition of employment, on or before thirty-one (31) days from the date of commencement of professional duties or July 1, 1981, whichever is later, join the Ferris Faculty Association or pay a service fee to the Association equivalent to the amount of dues uniformly required of members of the Ferris Faculty Association, less any amounts not permitted by law; provided, however, that the bargaining unit member may authorize payroll deduction for such fee. In the event that a bargaining unit member shall not pay such service fee directly to the Association or authorize payment through payroll deduction, the College shall, at the request of the Association, deduct the service fee from the bargaining unit

service fee for 1981-1982, the period at issue, $ 24.80 went to the FFA, $ 211.20 to the MEA, and $ 48 to the NEA.

Petitioners were members of the Ferris faculty during the period in question and objected to certain uses by the unions of their service fees. Petitioners instituted this action, pursuant to Rev. Stat. §§ 1979-1981, 42 U. S. C. §§ 1983, 1985, 1986, in the United States District Court for the Western District of Michigan, claiming that the use of their fees for purposes other than negotiating and administering a collective-bargaining agreement with the Board of Control violated rights secured to them by the First and Fourteenth Amendments to the United States Constitution. Petitioners also claimed that the procedures implemented by the unions to determine and collect service fees were inadequate.

After a 12-day bench trial, the District Court issued its opinion holding that certain union expenditures were chargeable to petitioners, that certain other expenditures were not chargeable as a matter of law, and that still other expenditures were not chargeable because the unions had failed to sustain their burden of proving that the expenditures were made for chargeable activities. 643 F. Supp. 1306 (1986).

Following a partial settlement, petitioners took an appeal limited to the claim that the District Court erred in holding that the costs of certain disputed union activities were constitutionally chargeable to the plaintiff faculty members. Specifically, petitioners objected to the District Court's conclusion that the union constitutionally could charge them for the costs of (1) lobbying and electoral politics; (2) bargaining, litigation, and other activities on behalf of persons not in petitioners' bargaining unit; (3) public-relations efforts; (4) miscellaneous professional activities; (5) meetings and conventions of the parent unions; and (6) preparation for a strike which, had it materialized, would have violated Michigan law.

The Court of Appeals, with one judge dissenting in large part, affirmed. 881 F.2d 1388 (CA6

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member's salary and remit the same to the Association under the procedure provided below.

. . . .

"D. Bargaining unit members paying the service fee provided for herein or whose service fees have been deducted by the College from their salaries may object to the use of their service fee for matters not permitted by law. The procedure for making such objections is that officially adopted by the Association. A copy of the Association policy will be provided by the Association upon a request of a bargaining unit member." Record, Union Defendants' Exh. I, § 2.6; see 643 F. Supp. 1306, 1308, n. 3 (WD Mich. 1986).

1989). After reviewing this Court's cases in the area, the court concluded that each of the challenged activities was sufficiently related to the unions' duties as the exclusive bargaining representative of petitioners' unit to justify compelling petitioners to assist in subsidizing it. The dissenting judge concurred with respect to convention expenses but disagreed with the majority's resolution of the other items challenged. *Id.*, at 1394. Because of the importance of the issues, we granted certiorari. 496 U.S. 924 (1990).

II

This is not our first opportunity to consider the constitutional dimensions of union-security provisions such as the agency-shop agreement at issue here. * * * [But i]t was not until the decision in *Abood* that this Court addressed the constitutionality of union-security provisions in the public-employment context. There, the Court upheld the same Michigan statute which is before us today against a facial First Amendment challenge. At the same time, it determined that the claim that a union has utilized an individual agency-shop agreement to force dissenting employees to subsidize ideological activities could establish, upon a proper showing, a First Amendment violation. In so doing, the Court set out several important propositions:

First, it recognized that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." 431 U.S. at 222. Unions traditionally have aligned themselves with a wide range of social, political, and ideological viewpoints, any number of which might bring vigorous disapproval from individual employees. To force employees to contribute, albeit indirectly, to the promotion of such positions implicates core First Amendment concerns. See, e. g., *Wooley v. Maynard*, 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all").

Second, the Court in *Abood* determined that, as in the private sector, compulsory affiliation with, or monetary support of, a public-employment union does not, without more, violate the First Amendment rights of public employees. Similarly, an employee's free speech rights are not unconstitutionally burdened because the employee opposes positions taken by a union in its capacity as collective-bargaining representative. "[T]he judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222.

In this connection, the Court indicated that the considerations that justify the union shop in the private context -- the desirability of labor peace and eliminating "free riders" -- are equally important in the public-sector workplace. Consequently, the use of dissenters' assessments "for the purposes of collective bargaining, contract administration, and grievance adjustment," *id.*, at 225-226, approved under the RLA, is equally permissible when authorized by a State vis-a-vis its own workers.

Third, the Court established that the constitutional principles that prevent a State from conditioning public employment upon association with a political party, see *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) (plurality opinion), or upon professed religious allegiance, see *Torcaso v. Watkins*, 367 U.S. 488, 6 L. Ed. 2d 982, 81 S. Ct. 1680 (1961), similarly prohibit a public employer "from requiring [an employee] to contribute to the support of an ideological cause he may oppose as a condition of holding a job" as a public educator. 431 U.S. at 235.

The Court in *Abood* did not attempt to draw a precise line between permissible assessments for public-sector collective-bargaining activities and prohibited assessments for ideological activities. It did note, however, that, while a similar line must be drawn in the private sector under the RLA, the distinction in the public sector may be "somewhat hazier." *Id.*, at 236. This is so because the "process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Ibid.*

Finally, in *Ellis*, the Court considered, among other issues, a First Amendment challenge to the use of dissenters' funds for various union expenses including union conventions, publications, and social events. Recognizing that by allowing union-security arrangements at all, it has necessarily countenanced a significant burdening of First Amendment rights, it limited its inquiry to whether the expenses at issue "involve[d] additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." 466 U.S. at 456 (emphasis added).

Applying that standard to the challenged expenses, the Court found all three to be properly supportable through mandatory assessments. The dissenting employees in *Ellis* objected to charges relating to union social functions, not because those activities were inherently expressive or ideological in nature, but purely because they were sponsored by the union. Because employees may constitutionally be compelled to affiliate with a union, the Court found that forced contribution to union social events that were open to all imposed no additional burden on their First Amendment rights. Although the challenged expenses for union publications and conventions were clearly communicative in nature, the Court found them to entail little additional encroachment upon freedom of speech, "and none that is not justified by the governmental interests behind the union shop itself." *Ibid.* See also *Keller v. State Bar of California*, 496 U.S. 1, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990), and *Communications Workers v. Beck*, 487 U.S. 735, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988).

Thus, although the Court's decisions in this area prescribe a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting employees, they also set forth several guidelines to be followed in making such determinations. *Hanson* and *Street* and their progeny teach that chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

III

In arguing that these principles exclude the charges upheld by the Court of Appeals, petitioners propose two limitations on the use by public-sector unions of dissenters' contributions. First, they urge that they may not be charged over their objection for lobbying activities that do not concern legislative ratification of, or fiscal appropriations for, their collective-bargaining agreement. Second, as to nonpolitical expenses, petitioners assert that the local union may not utilize dissenters' fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong. We accept the former proposition but find the latter to be foreclosed by our prior decisions.

A

[In this section, four justices would have refused to require dissenting bargaining unit members to "subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." This is not part of the Court's majority opinion.]

B

Petitioners' contention that they may be charged only for those collective-bargaining activities undertaken directly on behalf of their unit presents a closer question. While we consistently have looked to whether nonideological expenses are "germane to collective bargaining," *Hanson*, 351 U.S.

at 235, we have never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit.

We think that to require so close a connection would be to ignore the unified-membership structure under which many unions, including those here, operate. Under such arrangements, membership in the local union constitutes membership in the state and national parent organizations. See 643 F. Supp. at 1308. See also *Cumero v. Public Employment Relations Board*, 49 Cal. 3d 575, 603-604, 778 P.2d 174, 192, 262 Cal. Rptr. 46 (1989) (noting the inherent "close organizational relationship").

The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.

The Court recognized as much in *Ellis*. There it construed the RLA to allow the use of dissenters' funds to help defray the costs of the respondent union's national conventions. It reasoned that "if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy." 466 U.S. at 448. We see no reason why analogous public-sector union activities should be treated differently.[5]

We therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. This conclusion, however, does not serve to grant a local union carte blanche to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit. The union surely may not, for example, charge objecting employees for a direct donation or interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally. Further, a contribution by a local union to its parent that is not part of the local's responsibilities as an affiliate but is in the nature of a charitable donation would not be chargeable to dissenters. There must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization. And, as always, the union bears the burden of proving the proportion of chargeable expenses to total expenses. *Teachers v. Hudson*, 475 U.S. at 306; *Abood*, 431 U.S. at 239-240, n. 40; *Railway Clerks v. Allen*, 373 U.S. at 122. We conclude merely that the union need not demonstrate a direct and tangible impact upon the dissenting employee's unit.

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[5] The Michigan Employment Relations Commission -- the state agency responsible for administering the Act -- has reached the same conclusion in applying the statute to local affiliates of the MEA and the NEA. In determining that the involvement of the NEA and the MEA in local contract administration and grievance adjustment was a legitimate aspect of the local's service fee, the agency explained that "to restrict chargeability to only those activities directly relating to the local bargaining unit is to totally ignore the fact of affiliation." Bridgeport-Spaulding Community Schools, 1986 MERC Op. 1024, 1057. See also Garden City School District, 1978 MERC Op. 1145, 1155-1156. While the agency's conclusions of law are without effect upon this Court, we find persuasive its factual findings regarding the structure and operation of labor organizations within its jurisdiction.

C

JUSTICE SCALIA would find "implicit in our cases since *Street*," the rule that "to be constitutional, a charge must at least be incurred in performance of the union's statutory duties." *Post*, at 558. As the preceding discussion indicates, we reject this reading of our cases. This Court never has held that the First Amendment compels such a requirement and our prior decisions cannot reasonably be construed to support his stated proposition. See, e.g., *Ellis*, 466 U.S. at 456 ("Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint"); see also *Keller v. State Bar of California*, 496 U.S. 1, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990) (distinguishing between statutory and constitutional duties in the context of integrated state bar membership).

Even if viewed merely as a prophylactic rule for enforcing the First Amendment in the union-security context, JUSTICE SCALIA'S approach ultimately must be rejected. As the relevant provisions of the Michigan Act illustrate,[6] state labor laws are rarely precise in defining the duties of public-sector unions to their members. Indeed, it is reasonable to assume that the Michigan provisions relating to collective-bargaining duties were purposefully drafted in broad terms so as to provide unions the flexibility and discretion necessary to accommodate the needs of their constituents. Here, as in the RLA context, "[t]he furtherance of the common cause leaves some leeway for the leadership of the group." *Street*, 367 U.S. at 778 (Douglas, J., concurring), quoted in *Abood*, 431 U.S. at 222-223.

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[6] As relevant here, § 11 of the Act provides:

> "Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer...." Mich. Comp. Laws § 423.211 (1978).

Section 15 provides in pertinent part:

Consequently, the terms of the Act provide a poor criterion for determining which charges violate the First Amendment rights of dissenting employees. The broad language of the Act does not begin to explain which of the specific activities at issue here fall within the union's collective-bargaining function as contemplated by our cases. Far from providing a bright-line standard, JUSTICE SCALIA'S "statutory duties" test fails to afford courts and litigants the guidance necessary to make these particularized distinctions.

More important, JUSTICE SCALIA'S rigid approach fails to acknowledge the practicalities of the complex interrelationship between public employers, employees, unions, and the public. The role of an effective representative in this context often encompasses responsibilities that extend beyond those specifically delineated in skeletal state labor law statutes. See *Abood*, 431 U.S. at 236. That an exclusive bargaining representative has gone beyond the bare requirements of the law in representing its constituents through employee contributions does not automatically mean that the Constitution has been violated, at least where the funded activities have not transgressed state provisions. "The very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds." *Ellis*, 466 U.S. at 456.

We therefore disagree with JUSTICE SCALIA that any charge that does not relate to an activity expressly authorized by statute is constitutionally invalid, irrespective of its impact, or lack thereof, on free expression. In our view, his analysis turns our constitutional doctrine on its head. Instead of interpreting statutes in light of First Amendment principles, he would interpret the First Amendment in light of state statutory law. It seems to us that this proposal bears little relation to the values that the First Amendment was designed to protect. A rule making violations of freedom of

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"[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." § 423.214.

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speech dependent upon the terms of state employment statutes would sacrifice sound constitutional analysis for the appearance of administrability.

We turn to the union activities at issue in this case.

IV

* * * *

B

Petitioners next challenge the Court of Appeals' allowance of several activities that the union did not undertake directly on behalf of persons within petitioners' bargaining unit. This objection principally concerns NEA "program expenditures" destined for States other than Michigan, and the expenses of the Teacher's Voice listed as "Collective Bargaining" and "Litigation." Our conclusion that unions may bill dissenting employees for their share of general collective-bargaining costs of the state or national parent union is dispositive as to the bulk of the NEA expenditures. The District Court found these costs to be germane to collective bargaining and similar support services and we decline to disturb that finding. No greater relationship is necessary in the collective-bargaining context.

* * * *

D

The District Court and the Court of Appeals allowed charges for those portions of the Teachers' Voice that concern teaching and education generally, professional development, unemployment, job opportunities, award programs of the MEA, and other miscellaneous matters. Informational support services such as these are neither political nor public in nature. Although they do not directly concern the members of petitioners' bargaining unit, these expenditures are for the benefit of all and we discern no additional infringement of First Amendment rights that they might occasion. In short, we agree with the Court of Appeals that these expenses are comparable to the de minimis social activity charges approved in *Ellis*. See 466 U.S. at 456.

E

The Court of Appeals ruled that the union could use the fees of objecting employees to send FFA delegates to the MEA and the NEA conventions and to participate in the 13E Coordinating Council, another union structure. Petitioners challenge that determination and argue that, unlike the national convention expenses found to be chargeable to dissenters in *Ellis*, the meetings at issue here were those of affiliated parent unions rather than the local, and therefore do not relate exclusively to petitioners' unit.

We need not determine whether petitioners could be commanded to support all the expenses of these conventions. The question before the Court is simply whether the unions may constitutionally require petitioners to subsidize the participation in these events of delegates from the local. We hold that they may. That the conventions were not solely devoted to the activities of the FFA does not prevent the unions from requiring petitioners' support. We conclude above that the First Amendment does not require so close a connection. Moreover, participation by members of the local in the formal activities of the parent is likely to be an important benefit of affiliation. This conclusion is supported by the District Court's description of the 13E Coordinating Council meeting as an event at which "bargaining strategies and representational policies are developed for the UniServ unit composed of the Ferris State College and Central Michigan University bargaining units." 643 F. Supp. at 1326. As was held in *Ellis*, "[c]onventions such as those at issue here are normal events...and seem to us to be essential to the union's discharge of its duties as bargaining agent." 466 U.S. at 448-449.

F

The chargeability of expenses incident to preparation for a strike which all concede would have been illegal under Michigan law, Mich. Comp. Laws § 423.202 (1979), is a provocative question. At the beginning of the 1981-1982 fiscal year, the FFA and Ferris were engaged in negotiating a new collective-bargaining agreement. The union perceived these efforts to be ineffective and began to prepare a "job action" or, in more familiar terms, to go out on strike. These preparations entailed the creation by the FFA and the MEA of a "crisis center" or "strike headquarters." The District Court found that, "whatever label is attached to this facility, prior to a strike it serves as a meeting place for the local's membership, a base from which tactical activities such as informational picketing can be conducted, and serves to apply additional pressure on the employer by suggesting, whether true or not, that the local is prepared to strike if necessary." 643 F. Supp. at 1313.

Had the FFA actually engaged in an illegal strike, the union clearly could not have charged the expenses incident to that strike to petitioners. We can imagine no legitimate governmental interest that would be served by compelling objecting employees to subsidize activity that the State has chosen to disallow. See *Male v. Grand Rapids Education Association*, 98 Mich. App. 742, 295 N.W.2d 918 (1980), appeal denied, 412 Mich. 851, 312 N.W.2d 83 (1981) (holding that, under Michigan law, compulsory-service fees cannot include money allocated to the support of public-sector strikes). Similarly, one might expect the State to prohibit unions from using dissenters' funds to threaten or prepare for such conduct. The Michigan Legislature, however, has chosen not to impose such a restriction, and we do not find the First Amendment to require that limitation.

Petitioners can identify no determination by the State of Michigan that mere preparation for an illegal strike is itself illegal or against public policy, and we are aware of none. Further, we accept the rationale provided by the Court of Appeals in upholding these charges that such expenditures fall "within the range of reasonable bargaining tools available to a public sector union during contract negotiations." 881 F.2d at 1394. The District Court expressly credited trial testimony by an MEA representative that outward preparations for a potential strike serve as an effective bargaining tool and that only one out of every seven or eight "job action investigations" actually culminates in a strike. 643 F. Supp. at 1312. The Court of Appeals properly reviewed this finding for clear error. See *Anderson v. Bessemer City*, 470 U.S. 564, 575, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985).

In sum, these expenses are substantively indistinguishable from those appurtenant to collective-bargaining negotiations. The District Court and the Court of Appeals concluded, and we agree, that they aid in those negotiations and inure to the direct benefit of members of the dissenters' unit. Further, they impose no additional burden upon First Amendment rights.[7] The union may properly charge petitioners for those costs.

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[7] That JUSTICE SCALIA'S "statutory duties" test is unworkable is evidenced by the fact that he apparently is unwilling to apply it fully to the charges at issue in this case. He agrees with our determination that dissenting employees may be charged for the local's contribution to the collective-bargaining activities of state and national parent associations. Yet the parent organizations are not bound by statute or by contract to provide collective- bargaining support to the local. Nor is the local statutorily required to affiliate with or contribute to its larger parent associations. The Justice concludes, as do we, that there is "no reason to insist that, in order to be chargeable, on-call services for use in the bargaining process be committed by contract rather than by practice and usage." *Post*, at 561. But this conclusion appears to be out of line with his view that dissenters may be charged only for services that the State has required the union to provide. Under his analysis, that

[Justice Scalia, concurring with many of the Court's conclusions but not with much of its reasoning, noted that he would hold that contributions can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent.]

Notes and Questions

1. Why must individuals who are not members of the union pay a representation fee? What other constitutional rights in addition to potential free speech claims could be infringed by this requirement?

2. Note the progression of cases related to agency fee charges, starting with *Abood*, and discussed in *LHE*, section 3.2.2., p. 178.

3. What is the institution's role when dissenting bargaining unit members challenge the amount of the agency fee? What if the agreement requires the institution to discharge a faculty member who refuses to pay the agency fee? How would this contractual requirement be applied to a tenured faculty member? To an untenured faculty member employed under a multiple-year contract?

4. What are the union's disclosure obligations after *Lehnert*? How do these requirements compare to the disclosure requirements imposed on the use of student fees? See *LHE*, § 4.11.2., pp. 521-523.

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the benefits of affiliation as a practical matter may aid the local union in performing its "statutory duties" should be irrelevant. Thus, he would prohibit charges for strike preparations despite his admission that "visible preparations for a strike [may] strengthen the union's position in negotiations." *Post*, at 562. In our view, this inconsistency highlights the unfeasibility of JUSTICE SCALIA'S approach.

SEC. 3.2.3. Bargaining Unit Eligibility of Full-Time Faculty.

NLRB v. Yeshiva University
444 U.S. 672, 100 S.Ct. 856

This case is set out on pp. 182-187 in *LHE*.

Notes and Questions

1. In prohibiting the faculty from bargaining with the administration, the Court relied on the "managerial employee" doctrine. What functions of the faculty did the Court find to contribute to their "managerial" status?

2. To what degree would bargaining over salaries interfere with the faculty's "managerial" duties? What potential contract issues could pose a conflict for the faculty's dual role?

3. On whose behalf do the faculty exercise their "independent judgment?" The institution's? The students'? Their own?

4. Is the Court really saying that collective bargaining and collegial decision making are incompatible? Is there language in the NLRA that addresses this issue?

5. The Court says that the University is the faculty; yet shortly after the decision was announced, University administrators announced a reduction in force that resulted in layoffs of faculty. The faculty did not participate in planning the RIF. If this event had occurred prior to the Supreme Court's ruling, should it have changed the outcome? Why or why not?

6. Which description of a university is more accurate -- Powell's or Brennan's? Is either generalization accurate for all or most "mature" colleges and universities?

89

7. *Yeshiva*engendered many challenges to faculty unions at private colleges. See *LHE*, § 3.2.3., pp. 187-189. Given the post-*Yeshiva* experience, what would be your advice to administrators at a private college who prefer that the faculty not bargain under the protections of the NLRA?

SEC. 3.2.5. Coexistence of Collective Bargaining and Traditional Academic Practices.

Problem 3

Jane Jones is the president of Hemlock College, a private liberal arts college in the Midwest. President Jones has arrived on campus recently, having come from a position as academic vice president at a large public university in a southern state.

Hemlock College has had a faculty senate for approximately 20 years, but the senate has been relatively inactive and is considered ineffective by most faculty. Just before President Jones assumed office, the faculty voted to be represented for purposes of collective bargaining by the Hemlock Independent Faculty Union. Negotiations have just begun.

Shortly after President Jones' arrival on campus, she decided to reinvigorate the faculty senate, for she is a strong believer in faculty governance. Several standing committees--one on faculty compensation, one on faculty teaching loads, one on curriculum, and one on parking--have been elected and are meeting. Some of the committees are ready to present a set of recommendations to the full senate, which, if it approves the recommendations, will forward them to President Jones for her approval.

Yesterday Freida Flynn, president of the faculty union, walked into President Jones' office. She was extremely upset, and accused President Smith of trying to "sabotage" the new union and to "torpedo" the negotiations. She said that the union would be filing an unfair labor practice charge with the National Labor Relations Board and that all activity by the faculty senate, including discussions that do not culminate in any recommendations at all, must cease.

President Jones has never worked in a unionized atmosphere before. What are the legal issues that this situation presents? Does the union have a strong claim before the National Labor Relations Board? Should she suspend all meetings of the faculty senate and its committees? Should she design some other form of faculty governance organization?

Please advise President Jones.

SEC. 3.3.2.1. Title VII of the Civil Rights Act of 1964.

Kunda v. Muhlenberg College
621 F.2d 532 (3d Cir. 1980)

This case is set out on pp. 209-213 in *LHE*.

Notes and Questions

1. The outcome in this case is unusual for two reasons. First, plaintiffs usually do not prevail in Title VII cases challenging tenure denials; courts generally defer to the judgments of faculty and administrators. Second, tenure (conditional or unconditional) is not usually awarded as a remedy even if a plaintiff succeeds in proving discrimination. For what reasons might judges be less willing to overturn academic employment decisions than decisions of other employers? For what reasons might courts be unwilling to award tenure as a remedy?

2. The court noted the strong support for Kunda from her faculty peers. There was no testimony that her past performance did not merit the award of tenure. How should courts balance such peer judgments with administrators' concerns for fiscal planning and institutional mission?

3. What rationale did the court use to support its award to Kunda of "conditional tenure"? What alternative remedy could the court have chosen? Would other alternatives have insulated Kunda from potential retaliation?

4. Although other plaintiffs have sought tenure as a remedy in discrimination lawsuits, the courts have usually been reluctant to comply. Recently, however, some federal courts have awarded tenure as a remedy for discrimination that the court believed was egregious. See the discussion of tenure as a remedy for discrimination, with particular attention to *Brown v. Trustees of Boston University*, in *LHE* pp. 213-215.

5. Several women have challenged tenure denials based upon their peers' determination that the topic of their research is unworthy, particularly when the "unworthy" discipline is women's studies. Are such considerations of unworthiness appropriate in making promotion and tenure decisions? Should a court defer to peer judgments based on determinations of the unworthiness of women's studies? Or is a disdain for women's studies as a discipline *per se* gender bias? For a discussion of this issue, see *Lynn v. Board of Regents*, 656 F.2d 1337 (9th Cir. 1981).

6. In the Civil Rights Act of 1991, Congress addressed the burdens of producing evidence that the defendant must meet when the plaintiff presents evidence that stereotyping based on one of Title VII's protected categories infected the employment decision. The defendant must demonstrate that the same decision would have been made regardless of the stereotyping. See 42 U.S.C. sec. 2000e-2(m), discussed in *LHE* at p. 204.

SEC. 3.3. Nondiscrimination in Employment.

Problem 4

The School of Engineering at Elite University, a private, non-profit university, has four departments: Electrical Engineering, Mechanical Engineering, Chemical Engineering, and Aerospace Engineering. Although the school has tried faithfully, it has been able to recruit only one woman faculty member -- a third-year assistant professor of aerospace engineering, Dr. Gemini.

Dr. Gemini has been offered a position at a prestigious university in a nearby state at a salary which is higher than that of several associate professors in Elite University's department of Aerospace Engineering. Dr. Gemini has implied that she would be willing to stay at Elite University if it can match the salary offer. Matching the salary offer will virtually exhaust the school's merit pay increase funds for the new year. However, the school has been identified by the University's affirmative action office as a unit in which women are severely underrepresented. In fact, the school will not be permitted to hire any male tenure-track faculty until more women faculty have been hired.

The school must make a decision regarding Dr. Gemini's request.

1. What are the legal issues related to a salary increase?

2. What factual information does the administration need before making the decision? What legal information does it need?

3. What appear to be the school's alternatives, and their advantages /disadvantages?

4. What decision should the school make? To what extent is this decision based on legal considerations? Policy considerations?

5. Would the legal issues change if Dr. Gemini had not received an outside offer, but merely demanded a bigger salary and threatened to leave if the university didn't comply?

McConnell v. Howard University

818 F.2d 58 (D.C. Cir. 1987)

Opinion for the Court filed by Circuit Judge Edwards.

Alan McConnell brought an action in the District Court alleging that Howard University (the "University") breached certain clear contractual obligations when it terminated his appointment as a tenured faculty member without cause and without adhering to prescribed procedures. He also claimed that University officials had made certain defamatory statements about him. The District Court entered summary judgment in favor of Howard University. *McConnell v. Howard Univ.*, 621 F. Supp. 327 (D.D.C. 1985). We agree that the defamation claim is without merit, and affirm that portion of the judgment. However, because the District Court applied erroneous legal theories in deciding the appellant's contract claims, and because there exist several disputed questions of fact material to those claims, we vacate that portion of the judgment and remand the case to the District Court for further proceedings.

I. BACKGROUND

Dr. McConnell was appointed as an associate professor of mathematics at Howard University in 1971, and was granted an appointment with indefinite tenure in 1975. One of the courses he was assigned to teach during the Fall 1983 semester was a section of Elementary Functions I, a course similar in content to a course in Algebra II. About forty students were enrolled in the class, all of whom were black. Dr. McConnell is white. At the first class session, on August 23, 1983, Dr. McConnell informed the class that, over the past ten years, fewer than half of the students who enrolled in Elementary Functions I successfully completed the course. He advised class members to cut back on their other commitments, by taking a reduced course load and by limiting their obligations outside of school, so that they would have sufficient time to study and prepare for his course.

On September 1, the fourth session of the class, McConnell administered a one-question quiz to the class based on material he had presented the previous sessions. Only five students out of forty correctly answered the question. At the next class session, McConnell reiterated his advice that the students concentrate their efforts on his class and cut back on their other activities. He then told the class the fable about a monkey who put his hand in a cookie jar and was unable to get his hand out because he had tried to grab too many cookies and was unwilling to let some of the cookies go.

Later, during that same class session, Dr. McConnell became distracted by a conversation between two students. He asked the students to refrain from talking to each other. Apparently, one of the students, Janice McNeil, took some exception to Dr. McConnell's request. A colloquy ensued, culminating in a verbal statement by Ms. McNeil to the effect that Dr. McConnell was a "condescending, patronizing racist." Dr. McConnell demanded that Ms. McNeil apologize, which she refused to do. Dr. McConnell then taught the remainder of the class session without further incident.

At the conclusion of the class, Dr. McConnell asked Ms. McNeil to remain so that he could speak with her. She refused. Dr. McConnell tried to meet with Ms. McNeil immediately before the next class session, on September 8, and Ms. McNeil again refused to speak with him. He then raised the subject during the September 8 class. Ms. McNeil refused to apologize or explain her actions, but instead told McConnell to "go on and teach the course." McConnell asked her to leave the classroom, and, when she refused to do so, he called the Office for Security. On the instructions of Dean Austin Lane, Dean for Special Student Services, an officer escorted Ms. McNeil to Dean Lane's office. Dr. McConnell requested that appropriate actions be taken. Dean Lane asked Ms. McNeil to apologize to Dr. McConnell, but she refused to do so. Dean Lane advised Ms. McNeil that her conduct was unacceptable and that any further activity of this kind would result in disciplinary action.

At the next meeting of the class, on September 13, Dr. McConnell renewed his request that Ms. McNeil either apologize or leave the room. Ms. McNeil refused to do either. Thereupon, Dr. McConnell dismissed the entire class. Upon hearing of this development, Professor James D. Donaldson, Chairman of the Mathematics Department, advised Dr. McConnell that his actions could be considered by the University as neglect of his professional responsibilities. Dr. McConnell, however, emphasized that he would not return to the classroom until the "right atmosphere" was reestablished by having Ms. McNeil either apologize or remove herself from the class.

The next day, Dr. McConnell sent a letter to Dean Lane requesting that disciplinary action be taken against Ms. McNeil for her allegedly slanderous statement, and that she be removed from his class pending satisfactory resolution of the situation. On September 15, the day of the next session of the class, Professor Donaldson handed Dr. McConnell a letter directing him to resume teaching the Elementary Functions course. Professor Donaldson accompanied Dr. McConnell into the classroom. Dr. McConnell renewed his request to Ms. McNeil to either apologize or leave the classroom. When she refused to do either, Dr. McConnell gave the following statement to the class:

> It will be clear to most of you that a proper academic atmosphere conducive to teaching and learning is not possible in the presence of a person who persists in her right to slander the teacher. I have requested the administration of this University to restore conditions to this classroom in which you and I can resume our proper work. I remain hopeful that they will soon do this. We shall resume as soon as they do.[2]

He then left the classroom, and Professor Donaldson proceeded to teach the class. That same day, Dean Lane sent Dr. McConnell a letter indicating that slander was not an offense under the University System of Judiciaries and Code of Conduct, and that no further action would be taken with regard to Ms. McNeil.

On September 19, Dr. McConnell met with Professor Donaldson and Dr. Michael R. Winston, the University's Vice President for Academic Affairs. Dr. Winston told Dr. McConnell that if McConnell persisted in his refusal to teach, further action would be taken against him. Dr. McConnell indicated that he was eager to return to the class, but felt that he could not do so until the proper teaching atmosphere was restored. After Dr. McConnell failed to appear at the next scheduled session of the class, September 20, Robert L. Owens, III, the Dean of the College of Liberal Arts, instituted formal charges against Dr. McConnell, seeking the termination of Dr. McConnell's appointment at the University. Dr. McConnell was relieved of his duties to teach the Elementary Functions I class pending resolution of the case against him. He continued to teach his other assigned courses and to fulfill his other responsibilities as an associate professor.

A Grievance Committee, composed of five tenured faculty members outside the mathematics department, was convened to conduct a hearing and make findings and recommendations. The committee held a hearing on October 22 and 24, and on December 21 reported its findings and recommendations. It found that "Dr. McConnell did not neglect his professional responsibility." *Report of the Liberal Arts Grievance Committee* dated December 21, 1983 at 6, reprinted in *Appendices to Brief for Appellant* (*Appellant App.*) 66. The Grievance Committee emphasized that, although failure to teach an assigned class might ordinarily justify termination, in this case "the mitigating circumstances are such that termination is not warranted." *Id.* at 7, reprinted in *Appellant App*. 67. It noted that the incident must be placed "within a broader context of professorial authority inherent in the teacher-student relationship," *id.*, and that "[a] teacher has the right to expect the University to protect the professional authority in teacher-student relationships." *Id.* at 8, reprinted in *Appellant App*. 68 . It viewed the failure of Dr. McConnell to teach the class "as being as much a consequence of attempts to restore what he believed to be standard teacher-student relationships as a neglect of his professional responsibilities." *Id.* The Committee also noted that "it is convincingly clear from the evidence presented that [Dr. McConnell's] departmental colleagues, including the Departmental Chairman, fail[ed] to view him as being professionally negligent." *Id.* In addition to exonerating Dr. McConnell's actions, the Grievance Committee pointed to the failure of the University to take adequate steps to support Dr. McConnell in the aftermath of the McNeil incident. *Id.* at 6-7, reprinted in *Appellant App*. 66-67.

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[2] Exhibit 12 to Defendant's Statement of Material Facts as to Which There is no Genuine Issue.

The report and the record of the hearing were transmitted to Dr. James E. Cheek, President of the University. He then transmitted to the Board of Trustees the record and a two-page summary of the report. The Board referred the matter to a subcommittee composed of three Board members. The subcommittee requested further clarification of the Grievance Committee's findings, and, in response, the Grievance Committee issued a supplementary report. This report emphasized that Dr. McConnell was willing to teach the Elementary Functions I class "provided some efforts were made to resolve what he saw as a disruptive situation caused by Miss McNeil's actions;" that Dr. McConnell had acted in good faith to resolve the situation; that administrative procedures for handling such student incidents were "apparently inadequate;" that Dr. McConnell was not adequately informed by the University as to what avenues of redress were available to him; and that there was no evidence that Dr. McConnell had been negligent in his relations with students or faculty. *Report of the Liberal Arts Grievance Committee* dated April 5, 1984 at 1-2, reprinted in *Appellant App*. 71-72.

Despite the findings of the Grievance Committee, the Trustees' subcommittee recommended that Dr. McConnell's appointment at the University be terminated. On June 2, 1984, the Board of Trustees so voted, terminating Dr. McConnell's appointment as of that date.

* * * *

Dr. McConnell filed an action in the District Court alleging that Howard University breached its contract with him by terminating his appointment, and also alleging that University officials had made defamatory statements about him. The court granted Howard University's motion for summary judgment on both claims.

The District Court viewed the Faculty Handbook as constituting the contract defining the parties' rights and obligations. The trial court found that, under the contract, Dr. McConnell's appointment could be terminated for neglect of professional responsibilities and that the teaching of assigned classes was a professional responsibility. The judge held that Dr. McConnell's "refusal to teach a class...must constitute a failure to meet a professional responsibility," 621 F. Supp. at 331, and so Dr. McConnell was terminated for "cause." He further found "no provision of the contract giving [Dr. McConnell] any legal right to be excused from performance of his teaching duty." *Id.* Finally, the trial judge found no "material evidence that [Dr. McConnell] was deprived of procedural rights guaranteed by the contract." *Id.* at 330-31. Therefore, termination was proper under the contract.

The District Court went on to hold that, under the contract and general principles of adjudication, judicial review of the University's actions was limited and that the Board of Trustees' decision should be upheld "unless the Board's decision was arbitrary, or plaintiff has proffered evidence of improper motivation or irrational action." *Id.* at 311; see also *id.* at 330 n.13. ("The cases generally support the proposition...that a federal court should hesitate before significantly intruding in the administration of university affairs...."). The court then found that the Board's decision was not "arbitrary" or "irrational," and that there was no evidence of improper motivation. *Id.* at 331.

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II. THE BREACH OF CONTRACT CLAIMS

The appellant argues that summary judgment was inappropriate in this case because a number of material facts are in dispute. Moreover, he alleges that the District Court relied on improper legal theories in rendering its judgment. We agree. As will be shown below, using the correct legal framework, several disputed issues of fact must be resolved before a judgment may be rendered on the appellant's breach of contract claims.

A. Introduction

It is well established that, under District of Columbia law, an employee handbook such as the Howard University Faculty Handbook defines the rights and obligations of the employee and the employer, and is a contract enforceable by the courts. See *Greene v. Howard Univ.*, 134 U.S. App. D.C. 81, 412 F.2d 1128, 1132 (D.C. Cir. 1969); *Howard Univ. v. Best*, 484 A.2d 958, 970 (D.C. 1984). Our analysis of this case must, therefore, begin with an examination of the Faculty Handbook. The Faculty Handbook provides that, "subject to provisions in Section VI [specifying dismissal procedures], an appointment with indefinite tenure is terminable by the University only for cause or on account of extraordinary financial emergencies." Among the enumerated causes is "neglect of professional responsibilities." The parties agree that Dr. McConnell enjoyed an appointment with indefinite tenure and that the sole ground for his dismissal was neglect of professional responsibilities. Thus, the relevant issues are whether Dr. McConnell, by failing to teach four classes, neglected his professional responsibilities, and, assuming that he did, whether the University followed the procedures set forth in the Faculty Handbook.

B. Neglect of Professional Responsibilities

The District Court apparently viewed the term "neglect of professional responsibilities" as if the words "neglect of" were interchangeable with the words "failure to meet." It held that "it seems incontrovertible that the refusal to teach a class (flouting direct administration orders in the process) must constitute a failure to meet a professional responsibility." 621 F. Supp. at 331. It is difficult to doubt the assertion that teaching assigned classes was part of McConnell's professional responsibilities and that, by not teaching assigned classes, McConnell failed to meet a professional responsibility. "Failure to meet professional responsibilities," however, is not the standard set forth in the Faculty Handbook for dismissal for cause; "neglect of professional responsibilities" is. Thus, the issue that must be resolved is whether Dr. McConnell's failure to teach assigned classes constituted neglect of his professional responsibilities.

Dr. McConnell contends that his failure to teach the classes did not constitute neglect of professional responsibilities. He maintains that the McNeil incident disrupted the class and that he needed to reestablish an appropriate teaching atmosphere before he could resume teaching. In essence, Dr. McConnell asserts that, had he persisted in attempting to teach the class without resolving the incident, he could not teach effectively, and would thus be neglecting his professional responsibilities by continuing to teach in such a situation. Dr. McConnell argues that the District Court erred in viewing his failure to teach as per se constituting cause for his dismissal.

We agree with the appellant. The term "neglect" necessarily implies an assessment as to whether Dr. McConnell's actions, given the entire factual context, were within the acceptable range of conduct within his profession. The Grievance Committee's findings suggest that Dr. McConnell's actions may well not have constituted a neglect of professional responsibilities. The Grievance Committee stated that, in its view, Dr. McConnell's decision not to teach the class was an attempt "to restore what [he] believed to be standard teacher-student relationships," *Report of the Liberal Arts Grievance Committee* dated December 21, 1983 at 8, reprinted in *Appellant App*. 68, and that "it is convincingly clear from the evidence presented that his departmental colleagues, including the Departmental Chairman, fail to view him as being professionally negligent." *Id.*

At trial, Dr. McConnell should be allowed to present evidence that, under the facts and circumstances of this case, he acted within the bounds of reasonable behavior for a professor. Among the relevant issues are: (1) whether Dr. McConnell's reaction to the McNeil incident was a reasonable one; (2) whether Dr. McConnell took reasonable steps to resolve the incident; and (3) whether, under the circumstances, including Howard University's alleged lack of action to rectify the McNeil incident, McConnell acted reasonably in deciding not to teach the class until Ms. McNeil either dropped the class or apologized.

In short, we believe that the term "neglect of professional responsibilities," by its very words, includes a consideration of the reasonableness of Dr. McConnell's actions under the totality of the circumstances surrounding them. We also believe that the very concept of termination for "cause" necessarily includes the consideration of mitigating factors. In any event, it is clear that the terms "neglect of professional responsibilities" and "cause" certainly do not explicitly exclude the consideration of reasonableness and mitigating circumstances. So, at worst, the terms are ambiguous and must be construed in keeping with general usage and custom at the University and within the academic community.

In the instant case, the termination procedures set forth in the Faculty Handbook make sense only if the determination as to whether "cause" for termination exists includes an assessment of professional standards in the context of the particular facts and circumstances. The termination procedures include a hearing before a Grievance Committee composed of tenured faculty members. The Grievance Committee, after conducting the hearing, then prepares a report containing findings and recommendations for presentation to the Board of Trustees. The Board then decides whether to adopt the Grievance Committee's recommendations, or to conduct its own review of the record. Such a structure, with fact-finding and recommendations made by a panel of fellow professors, would make little sense if the only relevant issue was whether an established responsibility had not been fulfilled. The contract clearly contemplates an evaluation of a professor's actions according to the standards of the profession and a determination as to whether, given the facts and circumstances, the actions of the professor constituted cause for termination. A wooden exercise in single-issue fact-finding is simply not contemplated under this structure.

In viewing Dr. McConnell's failure to teach as *per se* constituting cause for his dismissal, the District Court foreclosed consideration of the reasonableness of the appellant's actions and possible mitigating circumstances. This was error.

C. Breach of the Contract by the University's Inaction

Dr. McConnell also presents an alternative theory supporting his decision not to teach the classes. He claims that Howard University had a duty to act to rectify incidents such as the September 6 incident involving Ms. McNeil. Dr. McConnell maintains that if the University was in breach of its obligations to him as a result of its actions (or inaction) in the wake of the McNeil incident, it cannot terminate his appointment for his subsequent decision not to teach the classes.

There is no specific language in the Faculty Handbook regarding the University's role in resolving student/teacher grievances. However, Dr. McConnell argues that this duty is implied by the nature of the University setting and the existence of the Howard University Code of Conduct and of the System of Judiciaries that has been set up to enforce the code. The Code of Conduct states that "[a] student may be disciplined for...'[the] obstruction or disruption of teaching...or [of] other University activities.'" The Grievance Committee agreed with Dr. McConnell. It found that "the right to teach and the responsibilities associated with it are deeply rooted in academic tradition and re-inforced by various organizational structures in the academy." *Report of the Liberal Arts Grievance Committee* dated December 21, 1983 at 7, reprinted in *Appellant App*. 67. The Committee believed that "[a] teacher has the right to expect the University to protect the professional authority in teacher-student relationships." *Id.* at 8, reprinted in *Appellant App*. 68.

At trial, Dr. McConnell should be allowed to demonstrate that the University owed him a contractual duty to protect his professional authority in the classroom and that the University's actions constituted a breach of that duty. In this regard, we find it notable that, although Dean Lane stated that "the University strongly disapproves of the type of behavior attributed to Miss McNeill" and that "repetition of a similar incident on the part of the student [would not] be tolerated," the University apparently took no steps to address the incident. If it was powerless to do so, Dean Lane's statement that repetition of a similar incident would not be tolerated is curious. Furthermore, although Elementary Functions I was offered in multiple sections, the University evidently took no steps either to transfer Ms. McNeil to a different section, or to assign Dr. McConnell to a different section. The Grievance Committee's evaluation of the University's actions was blunt and damning: "No one representing the University seemed inclined to do anything except to prefer charges against Dr. McConnell." *Report of the Liberal Arts Grievance Committee* dated December 21, 1983 at 7, reprinted in *Appellant App*. 67.

If Dr. McConnell can show that the University owed him a duty to protect his professional authority, there is still an additional showing that must be made. He must also prove that, under the contract, the breach either relieved him of his obligation to teach or that the breach itself constituted a mitigating factor precluding the University from terminating his appointment for cause.

We cannot at this point offer a final assessment of the appellant's position with respect to the University's alleged inaction. But we find that he has presented a claim that easily withstands summary judgment. As this court noted in *Greene v. Howard University*, 412 F.2d at 1135, "contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars." Surely, "among a community of scholars," one who is assigned to teach must have some semblance of control over the classroom. If control is lost, learning invariably will be obstructed and the teacher will be unable to fulfill a professional responsibility. In such a situation, it seems quite clear that there are a number of issues to be resolved: (1) Has there been a significant breakdown in classroom discipline, i.e., such that teaching and learning are or may be impaired? (2) If so, does the fault lie with the students, the instructor, or both? (3) What is the role of the University in such a situation? and (4) If it has a role to play, has the University acted to protect the professional authority of the teacher and/or to restore order to the classroom?

On the facts of this case, the District Court must consider whether Dr. McConnell was due some support from the University that he did not receive in connection with a student disciplinary matter. This matter could not be resolved on summary judgment because the parties have vastly different views about the responsibility of the University under the contract to protect Dr. McConnell's professional authority in the classroom. The resolution of this issue -- along with the resolution of the issues pertaining to reasonableness and mitigating circumstances -- is essential to any determinations regarding "neglect of professional responsibilities" and "cause" to justify the termination of a tenured appointment.

* * * *

III. THE STANDARD OF REVIEW OVER THE UNIVERSITY'S DECISION

The foregoing analysis of Dr. McConnell's breach of contract claims assumes that the trial court's posture in reviewing these claims is no different than the posture a court would take in analyzing any breach of contract claim. Namely, the court is charged with interpreting the meaning of the contractual terms, and determining whether the facts establish that a party has breached those terms. Both the District Court and the appellee have advanced reasons why a court should not engage in its typical role in this case, and ought to take a more deferential stance toward Howard

University's decision to terminate Dr. McConnell's tenured appointment at the University. These arguments are without merit.

A. Contractual Limitation of Judicial Review

The District Court seized on language in the section of the Faculty Handbook dealing with the dismissal procedures stating that "the decision of the Board of Trustees shall be final." Faculty Handbook, reprinted in *McConnell v. Howard Univ.*, 621 F. Supp. at 335. It assumed that the "decision" referred to is the decision whether to terminate the services of the faculty member. The court then concluded:

> The plaintiff having agreed to accept employment on those terms, this Court should uphold the Board's decision and grant defendant's motion for summary judgment, unless the Board's decision was arbitrary, or plaintiff has proffered evidence of improper motivation or irrational action.

621 F. Supp. at 331.

In other words, according to the trial court, any Trustees' decision to fire a tenured faculty member is largely unreviewable, with judicial scrutiny limited to a modest inquiry as to whether the Trustees' decision was "arbitrary," "irrational" or infected by improper motivation. Such a reading of the contract renders tenure a virtual nullity. Faculty members like Dr. McConnell would have no real substantive right to continued employment, but only certain procedural rights that must be followed before their appointment may be terminated. We find this to be an astonishing concept, and one not compelled by a literal reading of the Faculty Handbook.

We begin with the language from the Faculty Handbook relied on by the District Court. It is clear to us that the language in the contract is not intended to shield decisions of the Board of Trustees from judicial scrutiny, but is designed to indicate the endpoint of the internal grievance procedures.

* * * *

Given the structure of the prescribed procedures, it appears that the Board of Trustees has tremendous leeway to reject findings of the Grievance Committee. If we were to adopt a view limiting judicial review over the substance of the Board of Trustees' decision, we would be allowing one of the parties to the contract to determine whether the contract had been breached. This would make a sham of the parties' contractual tenure arrangement.

On remand, the trial court must consider de novo the appellant's breach of contract claims; no special deference is due the Board of Trustees once the case is properly before the court for resolution of the contract dispute.[12]

B. Administrative Agency Analogy

Howard University attempts to argue from higher education cases involving public universities, usually involving due process claims, that courts should view the decisions of private universities as if they were made by government agencies. There is no basis for this conceptual leap. See Rosenblum, *Legal Dimensions of Tenure*, in FACULTY TENURE, *supra*, at 161 ("A tenure plan promulgated by a governing board of a public institution is generally considered a form of sublegislation having the force of law....In a private institution, any right to tenure is contractual rather than statutory."). The public university cases often involve situations in which there is no contract, or where no contract claim is alleged.

* * * *

Frequently, the only issue in these cases is whether, by taking certain disciplinary action, the university violated due process. By the very nature of such claims, the focus is on the reasonableness of the university's actions.

Here, in contrast, there is a contract to review, and it has been brought into issue by the appellant's legal complaint. The reasonableness of the University's actions is relevant only insofar as the actions are consistent with the parties' contract. It would make no sense for a court blindly to defer to a university's interpretation of a tenure contract to which it is an interested party. Moreover, the theory of deference to administrative action flows from prudential concepts of separation of powers, as well as statutory proscriptions on the scope of judicial review. Obviously, none of those factors apply here. The notion of treating a private university as if it were a state or federal administrative agency is simply unsupported where a contract claim is involved.[13]

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[12] We do not think that it is possible to argue that courts should view the Howard University termination procedures as a form of arbitration of tenure disputes. Although courts will often take a deferential posture in reviewing decisions made by arbitral bodies, this deference is premised on the fact that the arbitral remedy is one agreed upon by the parties and is fair. Even if it could be said that the parties "agreed" to make the Board of Trustees an arbitral body (as supplemented by the role of the Grievance Committee), we cannot say that this remedy would be a fair one. In *Manes v. Dallas Baptist College*, 638 S.W.2d 143 (Ct. App. Tex. 1982), the court rejected just such a claim: If the Board of Trustees was considered to be an arbitrator, the effect would be to allow one of the parties to act as judge in its own case. Such a result is totally inconsistent with the theory of arbitration. *Id.* at 145. We agree and reject the arbitration analogy.

* * * *

C. The Special Nature of the University

The appellee urges us to adopt the view of the District Court that "a federal court should hesitate before significantly intruding in the administration of university affairs, particularly in a three-cornered dispute between a professor, a student and a university." 621 F. Supp. at 330 n.13. We find no support for this argument in this case. This is not a "three-cornered dispute;" rather, what is at stake are the contractual rights of Dr. McConnell. However, taking the point more broadly, we do not understand why university affairs are more deserving of judicial deference than the affairs of any other business or profession. Arguably, there might be matters unique to education on which courts are relatively ill equipped to pass judgment. However, this is true in many area of the law, including, for example, technical, scientific and medical issues. Yet, this lack of expertise does not compel courts to defer to the view of one of the parties in such cases. The parties can supply such specialized knowledge through the use of expert testimony. Moreover, even if there are issues on which courts are ill equipped to rule, the interpretation of a contract is not one of them. We find no precedent in the District of Columbia for the District Court's view, nor do we find persuasive precedent in any other jurisdiction.

* * * *

In a thoughtful examination of the role of the courts in reviewing claims involving dismissal determinations, Clark Byse and Louis Joughin have written:

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[13] It is beyond doubt that Howard University is not a public university. See *Sanford v. Howard Univ.*, 415 F. Supp. 23, 29 (D.D.C. 1976), aff'd mem. 549 F.2d 830 (D.C. Cir. 1977); see also *McConnell v. Howard Univ.*, 621 F. Supp. at 330 n.13.

> The role of the courts in reviewing dismissal determinations by institutions which have sound, written tenure plans should be quite conventional and relatively simple. It would be the court's responsibility to determine whether the requirements of the plan had been complied with. Was there failure to follow the stated procedure? Were the facts proved by a preponderance of the evidence? Did the proved facts constitute disqualifying conduct within the meaning of the plan? Byse & Joughin, "Tenure in American Higher Education: Specific Conclusions and Recommendations", reprinted in ACADEMIC FREEDOM AND TENURE 210, 214 (L. Joughin ed. 1969).

We find no reason not to do here what courts traditionally do in adjudicating breach of contract claims: interpret the terms of the contract and determine whether the contract has been breached. On remand, we expect the District Court to fully consider Dr. McConnell's contract claims.

* * * *

V. CONCLUSION

We recognize that this is an important case. The termination of a tenured faculty member's appointment is a serious matter. In this appeal, Dr. McConnell has asked this court to determine his rights under his employment contract with Howard University. He does not ask for special treatment, but merely wishes Howard University to be made to account for its actions under its contract with him. We think that Dr. McConnell has raised a number of arguments that, if proved, would entitle him to relief under his contract. With the guidance provided in this opinion, we remand the case to the District Court so that Dr. McConnell will have an opportunity to prove his case.

As stated more fully above, this case is to be tried de-novo, just as with any other contract case. In order to prevail on the merits, Dr. McConnell must establish either that "cause" did not exist to terminate his appointment or that the prescribed internal procedures were not followed. As a matter of law, Howard University could only terminate Dr. McConnell's appointment under the contract if, in light of all the surrounding facts and circumstances and the prevailing professional norms, Dr. McConnell's failure to teach assigned classes constituted neglect of professional responsibility. Thus, Dr. McConnell may offer evidence that there were mitigating factors in his situation that would lead a reasonable professor to decide not to teach the classes. Dr. McConnell also may attempt to establish at trial that Howard University breached an obligation owed to him in the way it handled the incident involving Ms. McNeil, and that, under the contract, this breach would relieve Dr. McConnell of his duty to teach the classes.

Finally, Dr. McConnell can also seek to establish that the procedures used by Howard University did not comply with the contractual requirements.

* * * *

Notes and Questions

1. What is the source of the contractual terms or promises that the court is interpreting in this case? Could there be other sources of such contractual terms (see *LHE* § 3.1.1.)? What methodology does the court employ in interpreting these contractual terms? Is it a methodology that is favorable to (protective of) faculty members' rights?

2. If you were responsible for the university's litigation planning for this case, what position(s) might you assert or what actions might you take on remand? Would you seek to settle the case? On what terms?

3. Note the appellate court's discussion concerning "deference," and the difference between the appellate court's and trial court's views on this point. What is the basis for the assertion that courts should be more deferential to the decisions of universities than to those of other parties in litigation? Is the appellate court correct in rejecting this assertion in this case? Are there other types of cases in which judicial deference to the institution's decision would be justifiable?

4. The appellate court judge who wrote the opinion in this case is a former university professor (law). He is also an established scholar in the fields of higher education law and labor and employment law. Do you think this background may have influenced the result in this case? Legitimately so? For the better?

5. In addition to the discussion in *LHE* section 3.5.2., *McConnell* is also discussed in *LHE* sections 1.4.3.6. and 3.7.2.

Board of Regents of State Colleges v. Roth

408 U.S. 564 (1972)

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969.[1] The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law a state university teacher can acquire tenure as a "permanent" employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment "during efficiency and good behavior." A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing beyond his one-year appointment.[2] There are no statutory or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.

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[1] The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract.

The notice of his appointment provided that: "David F. Roth is hereby appointed to the faculty of the Wisconsin State University Position number 0262. (Location:) Oshkosh as (Rank:) Assistant Professor of (Department:) Political Science this (Date:) first day of (Month:) September (Year:) 1968." The notice went on to specify that the respondent's "appointment basis" was for the "academic year." And it provided that "regulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made." See n. 2, *infra.*

[2] Wis. Stat. § 37.31 (1) (1967), in force at the time, provided in pertinent part that:

> "All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher."

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be "discharged except for cause upon written charges" and pursuant to certain procedures.[3] A nontenured teacher, similarly, is protected to some extent during his one-year term. Rules promulgated by the Board of Regents provide that a nontenured teacher "dismissed" before the end of the year may have some opportunity for review of the "dismissal." But the Rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February 1 "concerning retention or nonretention for the ensuing year." But "no reason for non-retention need be given. No review or appeal is provided in such case."[4]

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[3] Wis. Stat. § 37.31 (1) further provided that:

> "No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision."

[4] The Rules, promulgated by the Board of Regents in 1967, provide:

> "RULE I -- February first is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date."
>
> "RULE II -- During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case.
>
> "RULE III -- 'Dismissal' as opposed to 'Non-Retention' means termination of responsibilities during an academic year. When a non-tenure faculty member is dismissed he has no right under Wisconsin Statutes to a review of his case or to appeal. The President may, however, in his discretion, grant a request for a review within the institution, either by a faculty committee or by the President, or both. Any such review would be informal in nature and would be advisory only.
>
> "RULE IV -- When a non-tenure faculty member is dismissed he may request a review by or hearing before the Board of Regents. Each such request will be considered separately and the Board will, in its discretion, grant or deny same in each individual case."

In conformance with these Rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969-1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

The respondent then brought this action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech.[5] Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.

The District Court granted summary judgment for the respondent on the procedural issue, ordering the University officials to provide him with reasons and a hearing. 310 F.Supp. 972. The Court of Appeals, with one judge dissenting, affirmed this partial summary judgment. 446 F.2d 806. We granted certiorari. 404 U.S. 909. The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year. We hold that he did not.

I

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount.[7] But the range of interests protected by procedural due process is not infinite.

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[5] While the respondent alleged that he was not rehired because of his exercise of free speech, the petitioners insisted that the non-retention decision was based on other, constitutionally valid grounds. The District Court came to no conclusion whatever regarding the true reason for the University President's decision. "In the present case," it stated, "it appears that a determination as to the actual bases of [the] decision must await amplification of the facts at trial....Summary judgment is inappropriate." 310 F.Supp. 972, 982.

[7] Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379. "While 'many controversies have raged about...the Due Process Clause,'...it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks

The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. It concluded that the respondent's interest in re-employment at Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily. 310 F.Supp., at 977-979. Undeniably, the respondent's re-employment prospects were of major concern to him -- concern that we surely cannot say was insignificant. And a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process.[8] But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake. See *Morrissey v. Brewer*, ante, at 481. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

"Liberty" and "property" are broad and majestic terms. They are among the "great [constitutional] concepts...purposely left to gather meaning from experience....They relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (Frankfurter, J., dissenting). For that reason, the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights.[9] The Court has also made clear that the property interests protected

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to terminate [a protected] interest..., it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, e. g., *Central Union Trust Co. v. Garvan*, 254 U.S. 554, 566; *Phillips v. Commissioner*, 283 U.S. 589, 597; *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594.

[8] "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut, supra*, at 378. See, e. g., *Goldberg v. Kelly*, 397 U.S. 254, 263; *Hannah v. Larche*, 363 U.S. 420. The constitutional requirement of opportunity for some form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process. See n. 7, *supra*.

[9] In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a "privilege," not a "right," and that procedural due process guarantees therefore were inapplicable. *Bailey v. Richardson*, 86 U. S. App. D. C. 248, 182 F.2d 46, aff'd by an equally divided Court, 341 U.S. 918. The basis of this holding has been thoroughly undermined in the ensuing years. For, as MR. JUSTICE BLACKMUN wrote for the

by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.[11]

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

II

"While this Court has not attempted to define with exactness the liberty...guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized...as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, e. g., *Bolling v. Sharpe*, 347 U.S. 497, 499-500; *Stanley v. Illinois*, 405 U.S. 645.

There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or

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Court only last year, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham v. Richardson*, 403 U.S. 365, 374. See, e. g., *Morrissey v. Brewer, ante*, at 482; *Bell v. Burson, supra*, at 539; *Goldberg v. Kelly, supra*, at 262; *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6; *Pickering v. Board of Education*, 391 U.S. 563, 568; *Sherbert v. Verner*, 374 U.S. 398, 404.

[11] "Although the Court has not assumed to define 'liberty' [in the Fifth Amendment's Due Process Clause] with any great precision, that term is not confined to mere freedom from bodily restraint." *Bolling v. Sharpe*, 347 U.S. 497, 499. See, e. g., *Stanley v. Illinois*, 405 U.S. 645.

immorality. Had it done so, this would be a different case. For "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437; *Wieman v. Updegraff*, 344 U.S. 183, 191; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123; *United States v. Lovett*, 328 U.S. 303, 316-317; *Peters v. Hobby*, 349 U.S. 331, 352 (DOUGLAS, J., concurring). See *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials.[12] In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For "to be deprived not only of present government employment but of future opportunity for it certainly is no small injury...."*Joint Anti-Fascist Refugee Committee v. McGrath, supra*, at 185 (Jackson, J., concurring).

* * * *

To be sure, the respondent has alleged that the nonrenewal of his contract was based on his exercise of his right to freedom of speech. But this allegation is not now before us. The District Court stayed proceedings on this issue, and the respondent has yet to prove that the decision not to rehire him was, in fact, based on his free speech activities.[13]

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[12] The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons.

[13] See n. 5, supra. The Court of Appeals, nonetheless, argued that opportunity for a hearing and a statement of reasons were required here "as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." 446 F.2d, at 810 (emphasis supplied). While the Court of Appeals recognized the lack of a finding that the respondent's nonretention was based on exercise of the right of free speech, it felt that the respondent's interest in liberty was sufficiently implicated here because the decision not to rehire him was made "with a background of controversy and unwelcome expressions of opinion." *Ibid.*

When a State would directly impinge upon interests in free speech or free press, this Court

Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another. *Cafeteria Workers v. McElroy, supra*, at 895-896.

III

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests -- property interests -- may take many forms.

Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg v. Kelly*, 397 U.S. 254. See *Flemming v. Nestor*, 363 U.S. 603, 611. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower v. Board of Education*, 350 U.S. 551, and college professors and staff members dismissed during the terms of their contracts, *Wieman v. Updegraff*, 344 U.S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. *Connell v. Higginbotham*, 403 U.S. 207, 208.

Certain attributes of "property" interests protected by procedural due process emerge from

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has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus, we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. *Carroll v. Princess Anne*, 393 U.S. 175. Similarly, we have indicated the necessity of procedural safeguards before a State makes a large-scale seizure of a person's allegedly obscene books, magazines, and so forth. *A Quantity of Books v. Kansas*, 378 U.S. 205; *Marcus v. Search Warrant*, 367 U.S. 717. See *Freedman v. Maryland*, 380 U.S. 51; *Bantam Books v. Sullivan*, 372 U.S. 58. See generally Monaghan, First Amendment "Due Process," 83 *Harv. L. Rev.* 518.

In the respondent's case, however, the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest.

these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it.[16] In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

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[16] To be sure, the respondent does suggest that most teachers hired on a year-to-year basis by Wisconsin State University-Oshkosh are, in fact, rehired. But the District Court has not found that there is anything approaching a "common law" of re-employment; see *Perry v. Sindermann, post*, at 602, so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him.

IV

Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities.[17] For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.

We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[17] See, e. g., "Report of Committee A on Academic Freedom and Tenure, Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," 56 *AAUP Bulletin* No. 1, p. 21 (Spring 1970).

SEC. 3.6.2. The Public Faculty Member's Right to Constitutional Due Process.

Perry v. Sindermann
408 U.S. 593 (1972)

MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969 the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, for a time, the co-chairman of his department.

During the 1968-1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legislature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status -- a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

Finally, in May 1969, the respondent's one-year employment contract terminated and the Board of Regents voted not to offer him a new contract for the next academic year. The Regents issued a press release setting forth allegations of the respondent's insubordination[1]. But they provided him no official statement of the reasons for the nonrenewal of his contract. And they allowed him no opportunity for a hearing to challenge the basis of the nonrenewal.

The respondent then brought this action in Federal District Court. He alleged primarily that the Regents' decision not to rehire him was based on his public criticism of the policies of the college administration and thus infringed his right to freedom of speech. He also alleged that their failure to provide him an opportunity for a hearing violated the Fourteenth Amendment's guarantee of procedural due process. The petitioners -- members of the Board of Regents and the president of the college -- denied that their decision was made in retaliation for the respondent's public criticism and argued that they had no obligation to provide a hearing[2]. On the basis of these bare pleadings and three brief affidavits filed by the respondent, the District Court granted summary judgment for the petitioners. It concluded that the respondent had "no cause of action against the [petitioners] since his contract of employment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system."

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[1] The press release stated, for example, that the respondent had defied his superiors by attending legislative committee meetings when college officials had specifically refused to permit him to leave his classes for that purpose.

The Court of Appeals reversed the judgment of the District Court. 430 F.2d 939. First, it held that, despite the respondent's lack of tenure, the nonrenewal of his contract would violate the Fourteenth Amendment if it in fact was based on his protected free speech. Since the actual reason for the Regents' decision was "in total dispute" in the pleadings, the court remanded the case for a full hearing on this contested issue of fact. *Id.*, at 942-943. Second, the Court of Appeals held that, despite the respondent's lack of tenure, the failure to allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if the respondent could show that he had an "expectancy" of re-employment. It, therefore, ordered that this issue of fact also be aired upon remand. *Id.*, at 943-944. We granted a writ of certiorari, 403 U.S. 917, and we have considered this case along with *Board of Regents v. Roth, ante*, p. 564.

I

The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.

* * * *

II

The respondent's lack of formal contractual or tenure security in continued employment at Odessa Junior College, though irrelevant to his free speech claim, is highly relevant to his procedural due process claim. But it may not be entirely dispositive.

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[2] The petitioners claimed, in their motion for summary judgment, that the decision not to retain the respondent was really based on his insubordinate conduct. See n. 1, *supra*.

We have held today in *Board of Regents v. Roth, ante*, p. 564, that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. In *Roth* the teacher had not made a showing on either point to justify summary judgment in his favor.

Similarly, the respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protection. As in *Roth*, the mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty[5]. Nor did it amount to a showing of a loss of property.

But the respondent's allegations -- which we must construe most favorably to the respondent at this stage of the litigation -- do raise a genuine issue as to his interest in continued employment at Odessa Junior College. He alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration. In particular, the respondent alleged that the college had a de facto tenure program, and that he had tenure under that program. He claimed that he and others legitimately relied upon an unusual provision that had been in the college's official *Faculty Guide* for many years:

> "Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work."

Moreover, the respondent claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure[6]. Thus, the respondent offered to prove that a teacher with his long period of service at this particular State College had no less a "property" interest in continued employment than a formally tenured teacher at other colleges, and had no less a procedural due process right to a statement of reasons and a hearing before college officials upon their decision not to retain him.

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[5] The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he asserts to college officials that their decision was based on his constitutionally protected conduct. 430 F.2d, at 944. We have rejected this approach in *Board of Regents v. Roth, ante*, at 575 n. 14.

[6] The relevant portion of the guidelines, adopted as "Policy Paper 1" by the Coordinating Board on October 16, 1967, reads:

We have made clear in *Roth, supra*, at 571-572, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." *Id.*, at 577. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules

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> "A. Tenure
>
> "Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.
>
> "A specific system of faculty tenure undergirds the integrity of each academic institution. In the Texas public colleges and universities, this tenure system should have these components:
>
>> "(1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education. This is subject to the provision that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years (even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years).
>>
>> ....
>>
>> "(3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities."

The respondent alleges that, because he has been employed as a "full-time instructor" or professor within the Texas College and University System for 10 years, he should have "tenure" under these provisions.

or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid.*

A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be "implied." 3 A. *Corbin on Contracts* §§ 561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." *Id.*, at § 562. And, "the meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*

A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service -- and from other relevant facts -- that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 579, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See C. Byse & L. Joughin, *Tenure in American Higher Education* 17-28 (1959).[7]

In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution." 430 F.2d, at 943. Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency. Therefore, while we do not wholly agree with the opinion of the Court of Appeals, its judgment remanding this case to the District Court is affirmed.

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[7] We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "property interests...are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...."*Board of Regents v. Roth, supra*, at 577. If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.

Affirmed.

* * * *

Notes and Questions

(for both *Roth* and *Perry*)

1. In *Roth*, the Court refuses to find a protected liberty interest because the plaintiff was "simply not rehired." Does the Court mean to suggest that the plaintiff was not injured by the nonrenewal? What are the implications of nonrenewal for a faculty member's career path?

2. What institutional practices or policies may create a constitutionally-protected property interest in one's job? May faculty members in private institutions have such a property interest in their jobs?

3. Would it have made a difference in *Roth* if the plaintiff had previously been granted tenure and the university had sought to terminate tenure? If the faculty member had been dismissed at the end of the first year of an initial 2-year appointment?

4. How is *de facto* tenure acquired? How can colleges and universities avoid situations in which faculty acquire *de facto* tenure?

SEC. 3.7.2. Academic Freedom in the Classroom.

Martin v. Parrish

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

805 F.2d 583 (1986)

OPINION: EDITH HOLLAN JONES, Circuit Judge:

Whether a publicly-employed college teacher is constitutionally protected in the abusive use of profanity in the classroom is the most significant issue presented by this appeal. We hold that the constitution does not shield him and therefore AFFIRM the judgment of the district court.

I. BACKGROUND

Appellant Martin was an economics instructor at Midland College in Midland, Texas. Appellees are the president, vice president, dean and trustees of the college. The dean and vice president originally disciplined Martin in 1983, following a formal student complaint regarding Martin's inveterate use of profane language, including "hell," "damn," and "bullshit," in class. Martin was warned orally and in writing that should his use of profanity in the classroom continue, disciplinary action requiring suspension, termination or both would be recommended. Heedless of the administrators' concerns, Martin continued to curse in class, using words including "bullshit," "hell," "damn," "God damn," and "sucks.". Two students filed written complaints concerning Martin's speech in the classroom on June 19, 1984, which included the following statements: "the attitude of the class sucks," "[the attitude] is a bunch of bullshit," "you may think economics is a bunch of bullshit," and "if you don't like the way I teach this God damn course there is the door." Following notice of this outburst, the dean initiated actions to terminate Martin, which culminated, following several administrative steps, in approval by the college's board of trustees.

* * * *

II. ANALYSIS

Appellant asserts his language was not obscene, *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), but only profane and as such enjoys constitutional protection unless it caused disruption[2]. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). We find this argument an incomplete and erroneous expression of pertinent first amendment jurisprudence.

The constitution protects not simply words but communication, which presupposes a speaker and a listener, and circumscribes this protection for purposes which enhance the functioning of our republican form of government. The "rights" of the speaker are thus always tempered by a consideration of the rights of the audience and the public purpose served, or disserved, by his speech. Appellant's argument, by ignoring his audience and the lack of any public purpose in his offensive epithets, founders on several fronts.

Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), recently explained the limits of first amendment protection of speech afforded public employees like Martin. The Supreme Court reiterated that the goal of such protection is to prevent suppression of such employees' participation in public affairs and "chilling" of their freedom of political association. 461 U.S. at 145-46, 103 S. Ct. at 1689. It is limited to speech on matters of "public concern," otherwise, government would be hobbled in its regulation of employment conditions, and public employees would enjoy an immunity from the consequences of their speech not shared by anyone in the private sector. If the offending speech does not bear upon a matter of public concern, "it is unnecessary for us to scrutinize the reasons for [the] discharge." *Connick*, 461 U.S. at 147, 103 S. Ct. at 1690. Moreover, "whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement...." *Id.*[3]

There is no doubt that Martin's epithets did not address a matter of public concern. One student described Martin's June 19, 1984, castigation of the class as an explosion, an unprovoked, extremely offensive, downgrading of the entire class. In highly derogatory and indecent terms, Martin implied that the students were inferior because they were accustomed to taking courses from inferior, part-time instructors at Midland College. The profanity described Martin's attitude toward his students, hardly a matter that, but for this lawsuit, would occasion public discussion. Appellant has not argued that his profanity was for any purpose other than cussing out his students as an expression of frustration with their progress -- to "motivate" them -- and has thereby impliedly conceded his case under *Connick*.

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[2] Appellant also argues vigorously that he has a first amendment right to "academic freedom" that permits use of the language in question. It is, however, undisputed that such language was not germane to the subject matter in his class and had no educational function. Thus, as in *Kelleher v. Flawn*, 761 F.2d 1079, 1085 (5th Cir. 1985), we find it unnecessary to reach this issue.

[3] Only if the speech passes this first test of protection does the court "balance" the employee's rights against any disruptive effect on the employer's mission. *Connick*, 461 U.S. at 151-55, 103 S. Ct. at 1692-94.

* * * *

The judgment of the district court is AFFIRMED.

ROBERT MADDEN HILL, Circuit Judge, concurring in the judgment.

I concur in the judgment because I believe that *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), controls this case.

* * * *

Connick states that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick*, 461 U.S. at 147, 103 S. Ct. at 1690. Whether an employee's speech addresses a matter of public concern must be determined "by the content, form and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S. Ct. at 1690.

The majority indicates that the profane nature of Martin's words preclude a finding that a matter of public concern is involved. The use of profane words by themselves, in my opinion, does not preclude a finding that an employee's speech addresses a matter of public concern. Instead, as *Connick* indicates, the record as a whole must be examined. Looking at Martin's comments as a whole, I agree with the majority's conclusion that they do not address a matter of public concern. While some of Martin's comments in isolation could be construed as challenging the attitude of the class in its approach to economics, the derogatory nature of the comments overall convinces me that no matter of public concern is involved. For the same reason, I agree with the majority that the question of Martin's first amendment right to "academic freedom" does not need to be reached in this case. While some of the comments arguably bear on economics and could be viewed as relevant to Martin's role as a teacher in motivating the interest of his students, his remarks as a whole are unrelated to economics and devoid of any educational function. Thus, I agree with the majority that Martin's discharge did not violate his first amendment rights.

* * * *

Notes and Questions

1. The majority also set out an alternative basis for its decision, relying on U.S. Supreme Court cases involving regulation of "indecent" speech in high schools and over the public airwaves. In a separate opinion, one judge concurred with the majority opinion insofar as it relied on *Connick*, but disagreed with the majority's attempt to apply the Supreme Court indecent speech cases to higher education.

2. In order for the speech of a public institution's faculty member to be protected under the *Connick* line of cases (see *LHE*, § 3.7.1., pp. 303 - 305), what criteria must be satisfied? Do these criteria suitably balance the interests of faculty members and the institution in the higher education context? Can principled distinctions between matters of public concern and matters of private concern be made in the higher education context? In the classroom context?

3. Specifically, what was the fatal flaw in the instructor's speech? Was it the profanity itself? Or was it the belittling nature of the speech? Or something else? Suppose the instructor had used the same profanity in the course of a lecture on the shortcomings of Communist economic systems; would the result have been different? Or suppose the instructor had made comments sharply derogatory of the students' attitudes but had used words like "heck" and "bull" rather than "hell" and "bullshit"; would the result have been different?

4. Could the instructor's speech have been considered "hate speech" (see *LHE* § 4.10.)? If so, why would it not be protected under the First Amendment, even though student hate speech often does receive such protection? (*LHE* § 4.10.)

5. For a faculty member, would a claim based on *Connick* and a claim based on academic freedom be one and the same? Must a faculty member's speech be on a matter of public

concern, under the *Connick* criteria, before any academic freedom protection may be claimed under the first amendment? See *Silva v. University of New Hampshire*, 1994 WL 504417 (D.N.H. 1994).

SEC. 3.7.2. Academic Freedom in the Classroom.

Parate v. Isibor

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
868 F.2d 821 (1989)

OPINION: KEITH, Circuit Judge.

Plaintiff Natthu S. Parate ("Parate"), whose contract to teach at Tennessee State University ("TSU") was not renewed, brought this civil rights action against defendants, various officials of TSU and the State University and Community College System of Tennessee.

* * * *

I.

Parate, a native of India, was appointed associate professor in the TSU Civil Engineering Department for the 1982-83 academic year, effective August 23, 1982. Parate received his Bachelor of Engineering degree from a university in India; his Master's degree from a university in England; and his Doctorate degree from a university in France. He has also done post-doctoral work in both France and Canada. Parate was appointed to a tenure-track position, which was subject to renewal on an annual basis. At all relevant times, Edward I. Isibor, a Nigerian, served as Dean of the School of Engineering and Technology, and Michael Samuchin served as Head of the Department of Civil Engineering.

In his first semester at TSU, Parate taught the course "Groundwater and Seepage" ("GWS"). At the beginning of the semester, Parate informed the class of his grading criteria. Students who earned 90 to 100 percent of the total coursework points would receive an "A" grade, and students who earned 80 to 90 percent would receive a "B" grade. The percentages were derived from points assigned to homework, class discussion, and examinations. Parate also stated that when awarding grades, he would consider individual students' extenuating circumstances.

After Parate distributed final grades in the "GWS" course, two students in the class, Students "X" and "Y," approached Parate and requested grade changes. Students "X" and "Y" had received final grades of 86.1 and 86.4, respectively. Student "X" contended that his grade should be changed because he had been involved in a serious legal matter while enrolled in the course. To support his argument, Student "X" showed Parate a court summons for a date in January, the month after the final exam. Parate reviewed Student "X's" performance and noted that he had fared better on the midterm examination than he had on the final examination. On the basis of Student "X's" overall course work and his extenuating personal circumstances, Parate agreed to change his grade to an "A." Parate discussed the matter with Samuchin, who concurred in the grade change.

Student "Y" also requested a grade change. However, because Student "Y" had cheated on the final examination and presented false medical excuses, Parate declined to change his grade. Parate explained that he personally observed Student "Y" cheating on the final examination; confronted him; and refused to give him credit for plagiarized answers. In addition, Parate recalled that Student "Y" had previously offered medical excuses lacking in credibility. On one occasion, Student "Y's" note said that he was indisposed by a headache, but on a day when no class was scheduled. Another note submitted by Student "Y" had been altered with "white-out" and was written over to state the student "was not prepared for exam." After hearing Parate's explanation, Samuchin concurred in his decision not to change Student "Y's" grade. When advised by Parate that his grade would not be changed, Student "Y," also a Nigerian, said that he would get his grade changed "through the Dean."

On February 14, 1983, Student "Y" contacted Isibor and appealed for a grade change in the "GWS" course. On February 26, 1983, Parate met with Mohan Malkani, the Associate Dean of the School of Engineering and Technology. After hearing Parate's explanation, Malkani agreed that there was no valid reason to change Student "Y's" grade to an "A." Isibor insisted that Parate meet with him, Malkani and Samuchin on March 3, 1983. At the meeting, Isibor instructed Parate to change Student "Y's" grade to an "A." Isibor also insisted that Parate sign a memorandum changing his official grading distribution for the "GWS" course so that a grade of 86 would be an "A" instead of a "B." When Parate refused, Isibor began to insult and berate him. Isibor said that Parate did not know how to teach, asked him where he got his degree, and stated that it would be very difficult to renew Parate's contract at TSU.

On the following day, Samuchin again met with Parate. Samuchin had prepared memoranda for Parate's signature that referred to the purported change in the grading criteria for the "GWS" course. The memoranda also requested grade changes for both Students "X" and "Y." Although Parate signed the memoranda, he added a notation to each copy: "as per instructions from Dean and Department Head at meeting." Later the same day, Samuchin returned with retyped memoranda and explained to Parate that there was to be no notation referring to Isibor's instructions. Samuchin then warned Parate that if he failed to sign the retyped memoranda, then Isibor would "mess up" his evaluation. Parate signed the second set of memoranda, but to signify his protest, used a signature different from his normal one. Samuchin then returned with a third set of retyped memoranda, which Parate ultimately signed due to his fear of future reprisals from Isibor.

During both the 1983-84 and the 1984-85 academic years, Samuchin and Isibor engaged in a variety of retaliatory acts against Parate due to the "GWS" course incident. Samuchin and Isibor challenged Parate's grading criteria in other courses; sent him a letter critical of his teaching methods; and penalized him with low performance evaluations. By refusing Parate's requests for authorized professional travel and appropriate reimbursements, Samuchin and Isibor impeded Parate's research efforts and his presentation of papers at professional conferences. Ultimately, Samuchin and Isibor recommended the non-renewal of Parate's teaching contract.

On March 19, 1985, the President of TSU sent Parate a letter indicating that his tenure track appointment would not be renewed beyond the 1985-86 academic year. The letter stated that Parate could request from Samuchin a statement of reasons for non-renewal. Samuchin, however, never responded to Parate's request for such a statement. To resolve his differences with Isibor, Parate arranged a meeting on September 16, 1985. During this meeting, Isibor said that if Parate's performance improved, consideration would be given to the renewal of his teaching contract. Isibor concluded by telling Parate "you must obey and never disobey your Dean."

In late September 1985, one of Parate's classes was interrupted by a graduate student. This student demanded that Parate change his final grade in a course which had ended the previous year. On October 2, 1985, two Nigerian students complained about the grades they had received on a "Statics" course examination just returned by Parate. These students demanded "As" on the exam; questioned Parate's teaching competence in front of his other students; and threatened to go to Isibor. These students also stated that they would insure that Parate would not teach the "Statics" course in following semesters.

Two days later, on October 4, 1985, Parate held his "Statics" class as scheduled. Isibor and Samuchin, however, had preceded him into the classroom unannounced. After Parate began to call the roll, he was immediately interrupted. Isibor shouted from the back of the room: "Stop the roll call, don't waste time; circulate the paper for a roll call." Adhering to Isibor's directive, Parate began to teach his class, but was again interrupted by Isibor's shouts. Isibor next ordered Parate to complete one of the problems from the textbook. After Parate began to work out the problem on the blackboard and explain it to the students, Isibor again interrupted him. Isibor demanded that Parate complete the problem on the blackboard without addressing the students; that the students complete the problem on paper; and that Samuchin copy Parate's work from the board. Isibor soon approached the blackboard himself and began to work on the same problem that Parate and the students were completing. After severely criticizing Parate's teaching skills in front of his students, Isibor collected the students' papers and left the classroom.

After this class, Parate was summoned to a meeting with Isibor, Samuchin, Malkani, and a professor from the TSU Department of Industrial Arts and Technology. Isibor again began to berate Parate. He said that some of Parate's students were more intelligent than their teacher, and that Parate's salary could be stopped at any time. Isibor then removed Parate from his post as instructor of the "Statics" course, but directed Parate to attend the class as a student. Parate attended the class for five or six sessions, but was then told that Isibor no longer wanted him to attend. During that semester, Parate was never reinstated as the instructor of the "Statics" class. In the remainder of Parate's final academic year, 1985-86, Isibor and Samuchin continually sent faculty observers to his classroom.

II.

On April 4, 1986, Parate brought this civil action pursuant to 42 U.S.C. § 1983....

* * * *

In his complaint, Parate asserted causes of action for violations of his right to academic freedom under the First Amendment, and his liberty and due process interests under the Fourteenth Amendment. He also alleged state law claims for defamation, interference with his property right to work, retaliatory discharge, and intentional infliction of emotional distress. Parate then sought preliminary and injunctive relief, as well as an award of damages.

* * * *

In an order entered June 5, 1986, the district court denied Parate's motion for preliminary injunction and the defendants' motion to dismiss. Defendants Isibor and Samuchin, in their individual capacities, filed a motion for summary judgment on October 7, 1986. All of the defendants, in their official capacities, filed motions for summary judgment....

* * * *

III.

Judge Posner of the Seventh Circuit has explained that the term academic freedom "is used to denote both the freedom of the academy to pursue its end without interference from the government...and the freedom of the individual teacher...to pursue his ends without interference from the academy; and these two freedoms are in conflict." *Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625, 629 (7th Cir.), cert. denied, 474 U.S. 1007, 88 L. Ed. 2d 460, 106 S. Ct. 528 (1985). Other commentators have identified the problems inherent in resolving clashes between the academy and individual academics when both parties claim a constitutional right to academic freedom. See, e.g., Mertz, "The Burden of Proof and Academic Freedom: Protection for Institution or Individual?," 82 *Nw. U.L. Rev.* 492, 493 (1988); "Developments in the Law -- Academic Freedom," 81 *Harv. L. Rev.* 1045 (1968).

Academic freedom thrives not only on the robust and uninhibited exchange of ideas between the individual professor and his students, but also on the "autonomous decisionmaking [of]...the academy itself." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 & n. 12, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985). Justice Frankfurter summarized the "four essential freedoms" of the university:

> "'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevails "the four essential freedoms" of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"

Sweezy v. New Hampshire, 354 U.S. 234, 263, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957) (concurring in result), quoted in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978) (opinion of Powell, J.). Thus, while the Supreme Court has often expressed a reluctance to intervene in the prerogatives of state and local educational institutions, it has remained committed to the protection of their academic freedom, "a special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967).

The administration of the university rests not with the courts, but with the administrators of the institution. A nontenured professor does not escape reasonable supervision in the manner in which she conducts her classes or assigns her grades. See *Megill v. Board of Regents of the St. of*

Fla., 541 F.2d 1073 (5th Cir. 1976). University officials remain free to review a professor's classroom activities when determining whether to grant or deny tenure. The university may constitutionally choose not to renew the contract of a nontenured professor whose pedagogical attitude and teaching methods do not conform to institutional standards. *Hetrick v. Martin*, 480 F.2d 705, 708 (6th Cir.), cert. denied, 414 U.S. 1075, 38 L. Ed. 2d 482, 94 S. Ct. 592 (1973). The First Amendment concept of academic freedom does not require that a nontenured professor be made a sovereign unto himself. See *Lovelace v. Southeastern Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986).

* * * *

Although judicial concern has been expressed for the academic freedom of the university, the courts have also afforded substantial protection to the First Amendment freedoms of individual university professors. In *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957), the Supreme Court concluded that "teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." Thus, "that a teacher does have First Amendment protection under certain circumstances cannot be denied." *Fowler v. Board of Educ.*, 819 F.2d 657, 662 (6th Cir.), cert. denied, 484 U.S. 986, 108 S. Ct. 502, 98 L. Ed. 2d 501 (1987).

The individual university professor may claim that his assignment of an examination grade or a final grade is communication protected by the First Amendment. As does any communicative act, assigning a letter grade sends a message to the recipient. The message communicated by the letter grade "A" is virtually indistinguishable from the message communicated by a formal written evaluation indicating "excellent work." Both communicative acts represent symbols that transmit a unique message.

Because the assignment of a letter grade is symbolic communication intended to send a specific message to the student, the individual professor's communicative act is entitled to some measure of First Amendment protection.

* * * *

The freedom of the university professor to assign grades according to his own professional judgment is of substantial importance to that professor. To effectively teach her students, the professor must initially evaluate their relative skills, abilities, and knowledge. The professor must then determine whether students have absorbed the course material; whether a new, more advanced topic should be introduced; or whether a review of the previous material must be undertaken. Thus, the professor's evaluation of her students and assignment of their grades is central to the professor's teaching method.

* * * *

Although the individual professor does not escape the reasonable review of university officials in the assignment of grades, she should remain free to decide, according to her own professional judgment, what grades to assign and what grades not to assign. In the context of protected speech, the difference between compelled speech and compelled silence "is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *Riley v. National Fed'n. of the Blind of N.C.*, 487 U.S. 781, 108 S. Ct. 2667, 2677, 101 L. Ed. 2d 669 (1988)....

* * * *

Thus, the individual professor may not be compelled, by university officials, to change a grade that the professor previously assigned to her student. Because the individual professor's assignment of a letter grade is protected speech, the university officials' action to compel the professor to alter that grade would severely burden a protected activity.

In *Wooley v. Maynard*, 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977), the Supreme Court held that an individual could not be compelled to display the slogan "Live Free or Die" on his automobile license plate. In so holding, the Court relied on the principle that "the right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Id.* at 714 (quoting *Barnette*, 319 U.S. at 637). Similarly, the university professor must remain free to exercise his independent professional judgment in the assignment of grades and the evaluation of his students' academic progress.

If the speech of a nontenured professor is compelled by a university administrator, then the professor is not without redress for this violation of her constitutional rights. If a nontenured professor claims that she was not rehired in violation of a First Amendment right, she must first establish that her conduct was constitutionally protected, and then that this conduct was the motivating factor in her not being rehired. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977).

In the present appeal, we consider the claim of the individual professor, Parate. He argues that his First Amendment right to academic freedom was violated during the March 3, 1983, grading incident.

* * * *

The district court held that Parate's constitutional right to academic freedom does not permit him to override administrative authority; to ignore TSU grading policies; or to escape the supervision of the defendants over his grade assignments. In rebuttal, Parate correctly contends that even as a nontenured professor, he retains the right to review each of his students' work and to communicate, according to his own professional judgment, academic evaluations and traditional letter grades. Parate, however, has no constitutional interest in the grades which his students ultimately receive. If the defendants had changed Student "Y's" "GSW" course grade, then Parate's First Amendment rights would not be at issue. Parate's First Amendment right to academic freedom was violated by the defendants because they ordered Parate to change Student "Y's" original grade. The actions of the defendants, who failed to administratively change Student "Y's" grade themselves, unconstitutionally compelled Parate's speech and precluded him from communicating his personal evaluation to Student "Y."

* * * *

Relying on *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547 (5th Cir.), cert. denied, 457 U.S. 1106, 73 L. Ed. 2d 1315, 102 S. Ct. 2906 (1982), the district court concluded that Parate's First Amendment claims should be dismissed. In *Hillis*, however, the plaintiff nontenured professor's contract was not renewed, in part, because he refused to give a student a "B" grade as directed by the head of his department. See *id.* at 549. Unlike the present defendants, the Hillis university administrators changed the student's grade. Unlike Parate, the *Hillis* professor was not forced, in violation of his own professional judgment, to personally change his student's grade. Because the *Hillis* professor's speech was not compelled in violation of the First Amendment, as was Parate's, the *Hillis* case is inapplicable here.

* * * *

The district court also relied on *Hetrick v. Martin*, 480 F.2d 705 (6th Cir.), cert. denied, 414 U.S. 1075, 38 L. Ed. 2d 482, 94 S. Ct. 592 (1973). In *Hetrick*, this Court found that no First

Amendment interests were implicated when a state university did not renew the contract of a nontenured professor because her pedagogical style and teaching methods did not conform to the university's standards. See *id.* at 708. In the present appeal, however, defendants did not try to alter Parate's pedagogical style, but compelled his speech by demanding that he change, against his own professional judgment, a grade previously assigned.

We believe that the acts of the defendants deserve exacting First Amendment scrutiny. First, we consider Parate's First Amendment right to academic freedom and his interest in eliminating the defendants' arbitrary interference in the assignment of his course grades. Second, we consider Parate's First Amendment right to be free from compelled speech. By insisting that Parate sign the grade change memoranda without including his reservations or the notation "per the instruction of the Dean," the defendants compelled Parate to conform to a belief and a communication to which he did not subscribe. We then balance Parate's interests against defendants' interest in having Parate personally change Student "Y's" grade. Arguing from their First Amendment right to academic freedom, the defendants assert an interest in supervising and reviewing the grading policies of their nontenured professors. If they deemed Parate's grade assignments improper, however, the defendants could have achieved their goals by administratively changing Student "Y's" grade. We conclude that by forcing Parate to change, against his professional judgment, Student "Y's" grade, the defendants unconstitutionally compelled Parate's speech and chose a means to accomplish their supervisory goals that was unduly burdensome and constitutionally infirm.

IV.

Parate next claims that the defendants' actions on October 4, 1985, violated his First Amendment right to academic freedom. Parate contends that the defendants not only precluded him from teaching his "Statics" course, but humiliated him before his students. Parate also alleges that because his contract had not been renewed prior to the classroom incident, the defendants did not intend to evaluate his teaching competence and illegitimately exercised their supervisory functions.

The district court found that the requisite test for evaluating the classroom incident is whether the defendants "cast a pall of orthodoxy over the classroom," and thereby violated Parate's First Amendment rights. *Keyishian,* 385 U.S. at 603. We agree with the district court's conclusion that the defendants' actions on October 4, 1985, did not rise to the level of a constitutional violation.

It has long been recognized that the purpose of academic freedom is to preserve the "free marketplace of ideas" and protect the individual professor's classroom method from the arbitrary interference of university officials. See *id.* University administrators, however, are free to observe, review or evaluate a nontenured professor's competence. See e.g., *Hetrick*, 480 F.2d at 709. Moreover, because public education in America is committed to the control of local and state authorities, the courts cannot intervene to resolve educational conflicts that do not "sharply implicate basic constitutional values." *Epperson*, 393 U.S. at 104. Although defendants' behavior was unprofessional, their actions on October 4, 1985, did not violate Parate's First Amendment right to academic freedom. First, Parate alleges that the defendants interfered with his classroom teaching on only one occasion. Thus, defendants' incidental conduct could not have resulted in a "pall of orthodoxy" being cast over Parate's "Statics" classroom. Second, Parate failed to allege that the defendants consistently denied him a free and open exchange with his students. Third, because Parate is a nontenured professor, he can allege no First Amendment right to teach a particular class or to be free from the supervision of university officials. See, e.g., *Hetrick*, 480 F.2d at 709.

As the district court correctly noted, the defendants' actions on October 4, 1985, rise at most to the level of a tort of defamation which is not cognizable under 42 U.S.C. § 1983. See *Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976).

V.

In addition to his claims under the First Amendment, Parate raises a Fourteenth Amendment claim that the defendants arbitrarily and unreasonably interfered with his substantive due process liberty interest in the free and full pursuit of his profession as a TSU professor. Parate also contends that the defendants maliciously, unreasonably, and arbitrarily terminated his employment with TSU in violation of his Fourteenth Amendment rights. We agree, however, with the district court's conclusion that Parate's claims under the Fourteenth Amendment guarantee of substantive due process should be dismissed.

This Court has long held that the "freedom to choose and pursue a career, 'to engage in any of the common occupations of life,' *Meyer v. Nebraska*, 262 U.S. 390, 399, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), qualifies as a liberty interest which may not be arbitrarily denied by the State." *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983).

* * * *

The district court considered two additional factors in analyzing Parate's claim that the defendants interfered with his freedom to pursue an occupation; (1) the nature and seriousness of the alleged governmental interference; and (2) the strength of the justification given. See *Wilkerson*, 699

F.2d at 328. The district court rejected Parate's claim and found that, as a nontenured professor, he was subject to discharge without cause and was justifiably terminated at the end of his one-year contract. Parate was not denied the choice of his career, but remains free to pursue his chosen profession at another university. Moreover, Parate has failed to demonstrate that the defendants brought false charges against him that "might seriously damage his standing and associations in his community" or that impose a "stigma or other disability" that prevents him from securing other employment. *Board of Regents v. Roth*, 408 U.S. 564, 573, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

* * * *

In *Sullivan v. Brown*, 544 F.2d 279 (6th Cir. 1976), this Court held that the transfer of a tenured teacher did not implicate her liberty interest under the Fourteenth Amendment because no constitutional right to teach a specific class exists. Thus, Parate cannot claim a Fourteenth Amendment right to teach at TSU; nor can he claim a constitutional right to teach a specific class. When the defendants removed Parate from the "Statics" class, no constitutional violation occurred.

* * * *

Parate next argues that a liberty interest may be created by state regulations or administrative rules that place substantive limits on official discretion. See *Hewitt v. Helms*, 459 U.S. 460, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983); *Spruytte v. Walters*, 753 F.2d 498 (6th Cir. 1985), cert. denied, 474 U.S. 1054, 88 L. Ed. 2d 767, 106 S. Ct. 788 (1986). He then posits the Tennessee Board of Regents' Policy, No. 5:02:03:00, which states that "'the faculty member is entitled to freedom in the classroom in discussing his or her subject, being careful not to introduce into the teaching controversial matter which has no relation to the subject....'" *Id.*, quoted in *Brief of Plaintiff-Appellant* at 33. Parate next contends that the Board of Regents' policy statement creates a liberty interest protected by the Fourteenth Amendment. Parate concludes that the defendants severely burdened this liberty interest when they berated him before his students and removed him from his "Statics" class.

In *Washington v. Starke*, 855 F.2d 346 (6th Cir. 1988), this Court concluded that:

> In determining whether state-enacted rules create a protected liberty interest, the key is "whether or not the state has imposed 'substantive limitations' on the discretion of [officers]...or, in other words, whether the state has used language of an unmistakably

> mandatory character." The mandatory nature of the regulation is the key, as a plaintiff "must have a legitimate claim of entitlement to the interest, not simply a unilateral expectation of it."

Id. at 349 (citations omitted). In the present appeal, the language of the Regents' policy statement is not of a mandatory character, but merely articulates broadly stated TSU goals. Because we have determined that the Regents' policy statement is not sufficiently mandatory to establish a liberty interest, we find Parate's arguments unpersuasive.

Parate finally contends that the defendants' actions so "shock the conscience" that they constituted official acts that are unconstitutional regardless of the procedural protections provided. See *Wilson*, 770 F.2d at 586. This Court has held, however, that "[a] citizen does not suffer a constitutional deprivation every time he is subject to the petty harassment of a state agent." *Vasquez v. City of Hamtramck*, 757 F.2d 771, 773 (6th Cir. 1985). Moreover, Parate has failed to prove that the defendants' conduct on October 4, 1985, was so severe, so disproportionate to the need presented, and such an abuse of authority "as to transcend the bounds of ordinary tort law and establish a deprivation of constitutional rights." *McClary v. O'Hare*, 786 F.2d 83, 88 (2d Cir. 1986). We, therefore, agree with the district court's characterization of the defendants' behavior as unprofessional, but we find no deprivation of Parate's right to substantive due process.

* * * *

VII.

After careful review of the record, we reverse the judgment of the district court dismissing Parate's First Amendment claims resulting from the March 3, 1983, grading incident. On this issue, we remand to determine damages and whether Parate was discharged due to the exercise of his First Amendment right to academic freedom. We affirm the judgment of the district court dismissing Parate's First Amendment claims resulting from the October 4, 1985, classroom incident; dismissing his Fourteenth Amendment claims; and denying his application for a preliminary injunction.

* * * *

Notes and Questions

1. The court suggests that the university, as well as the professor, has an academic freedom interest at stake in this case. (See *LHE*, § 3.7.1., pp. 299-300.) What is the university's academic freedom interest? Do the facts reveal that the university's interest in determining "who may teach" or "how it shall be taught," as described by Justice Frankfurter in *Sweezy*, is legitimately at stake in this case? Must such determinations be based "on academic grounds," as Justice Frankfurter suggests, before a court should consider them to implicate the institution's academic freedom?

2. The professor's academic freedom interest in grading, according to the court, is based on the free speech clause of the First Amendment. In extending free speech protection to the professor, is the court implying that the evaluation of individual student performance is a "matter of public concern?" (See *Martin v. Parrish*, above, this Supplement; see also *LHE*, § 3.7.1., p. 305.) Should the court have applied the public concern test and the rest of the *Pickering* balancing test in this case? Or would that test not apply to situations where a university has compelled a faculty member to speak?

3. The court's resolution of the grading issue does serve to extend faculty academic freedom protections into the classroom and into the area of teaching methods. (For another recent example of such an extension of protection, on nonconstitutional grounds, see the *McConnell* case, below, this *Supplement* (under § 3.5.), and see *LHE*, § 3.7.2., p. 312.) How extensive is the protection provided by the *Parate* case? How significant?

4. Might this case be extended to cover other aspects of grading? For instance, could the court's reasoning serve to protect a professor who refused the dean's order to allow a student to retake a math exam? Or to base course grades on a paper rather than exam? Or to maintain a particular grade distribution or grading mean?

5. The court quickly rejected the professor's claim based on the October 4, 1985 classroom incident. Is the court's view of this matter persuasive? Suppose the October 4 incident were

not viewed in isolation but as part of the continuing pattern of retaliation, described in the court's review of the case's facts, that began after the 1983 grading incident and extended beyond the October 4, 1985 classroom incident. Might this pattern of events then constitute a violation of academic freedom?

6. What remedy may the professor obtain upon remand of this case? Note very carefully the remand instructions at the end of the opinion.

7. Regarding the "liberty interest" type of analysis in part V of the court's opinion, see generally *LHE* § 3.6.2.

SECS. 3.7.1. - 3.7.6. General Concepts and Principles; Academic Freedom in the Classroom, in Researach and Publication, in Institutional Affairs, and *in Private Life.*

Jeffries v. Harleston
52 F.3d 9 (2d Cir. 1995)

OPINION: McLAUGHLIN, Circuit Judge:

In *Jeffries v. Harleston,* 21 F.3d 1238 (2d Cir. 1994), we affirmed the district court's judgment that 15 university officials violated the First Amendment rights of a professor, Leonard Jeffries, by reducing his term as a department chairman because of a controversial speech (the "Albany speech") he had given off campus. Our decision rested on what we understood to be the applicable rule that the government cannot take action against an employee for speaking on public issues, unless it first shows that the speech actually "impaired the efficiency of government operations." *Id.* at 1245.

* * * *

A month after our decision in *Jeffries*, the United States Supreme Court decided *Waters v. Churchill*, 511 U.S. _, 114 S. Ct. 1878 (1994) (plurality opinion). A four-justice plurality in *Waters* held that the government could fire an employee for disruptive speech based on its reasonable belief of what the employee said, regardless of what was actually said. See *Waters*, 114 S. Ct. at 1889. In addition, when weighing the value of the employee's speech against the interference with government operations, the *Waters* plurality also indicated that a government employer need only show that the speech is likely to be disruptive before the speaker may be punished. See *id.* at 1887, 1890.

The *Jeffries* defendants, relying on *Waters*, petitioned the Supreme Court for a writ of certiorari. The Supreme Court granted certiorari, and, without comment, vacated *Jeffries* and remanded to us for reconsideration in light of *Waters*. See *Harleston v. Jeffries,* 115 S. Ct. 502, 503 (1994) (memorandum).

On remand from the Supreme Court, we reverse the district court's judgment because defendants made a substantial showing at trial that their decision to limit Jeffries' term was based upon a reasonable prediction that the Albany speech would disrupt university operations.

BACKGROUND

We summarize the facts briefly; a more detailed account appears in our initial opinion. See *Jeffries*, 21 F.3d 1238, 1241-44.

Leonard Jeffries was the chairman of the Black Studies department at City College of New York ("City College"), which is part of the City University of New York ("CUNY") system. In delivering the Albany speech, which addressed the bias of New York State's public school curriculum and the history of black oppression, Jeffries made several derogatory statements, particularly about Jews. After the speech, City College President Bernard Harleston and CUNY Chancellor Ann Reynolds arranged for the CUNY Board of Trustees to vote as to whether to limit Jeffries' term as department chair to one year, even though such terms normally last three years. A majority of the 14 members of the CUNY Board of Trustees voted to limit Jeffries' term. The votes were cast as follows: Nine of the Trustees voted to limit Jeffries' term to a year; four voted to remove him immediately; one abstained because she had made critical comments about Jeffries in the past. Harleston and Reynolds did not vote because they were not Trustees.

Jeffries sued Harleston, Reynolds, and all 14 of the individual CUNY trustees under 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York (Kenneth Conboy, Judge), alleging that they removed him in violation of the First Amendment. (One of the 16 original defendants, Trustee Blanche Bernstein, died during the trial, and Jeffries discontinued his claims against her.) Jeffries sought reinstatement and punitive damages.

The jury was given several sets of interrogatories to answer. In response to the first wave, the jury found that the defendants demoted Jeffries because of the Albany speech. The jury's answers also indicated that the Albany speech did not disrupt "the effective and efficient operation of the Black Studies Department, the College, or the University," but that the defendants "were motivated in their actions by a reasonable expectation" that the speech would cause such a disruption. The judge concluded from these responses that all 15 remaining defendants had violated Jeffries' First Amendment rights because the speech was substantially on matters of public concern, and did not cause actual harm to CUNY.

The judge then submitted another wave of questions to the jury to discern the individual liability of each of the 15 defendants. In response, the jury found that only six defendants -- Harleston, Reynolds, and Trustees Edith Everett, Herman Badillo, Sylvia Bloom, and Harold Jacobs (together, the "Harleston defendants") -- took action against Jeffries because of the Albany speech, and would not have done so had Jeffries not given the speech. Of the four Trustees who are Harleston defendants, three had voted to remove Jeffries from his post immediately, and one had abstained because of the negative statements she had made about Jeffries in the past. (The fourth vote to remove Jeffries immediately came from Trustee Bernstein, who died during the trial, and is not part of this appeal.) The jury found that the other nine defendants, all of whom had voted to limit Jeffries' term to one year, did not act with the same retaliatory animus.

On the third and final wave of interrogatories, the jury found that all six of the Harleston defendants had "acted with malicious intent to violate the plaintiff's rights under the First Amendment...or with malicious intent to unlawfully injure him, or...with a callous or reckless disregard of the plaintiff's First Amendment rights." Based on these findings, the jury awarded punitive damages against the Harleston defendants.

* * * *

The district judge entered judgment consistent with the jury responses (although he reduced the punitive damage amounts). In addition, the judge ordered the defendants to reinstate Jeffries as chairman of the department for two years. The defendants appealed.

We affirmed the reinstatement order, agreeing with the district court that the defendants had violated Jeffries' right to free speech.

* * * *

See *Jeffries*, 21 F.3d at 1245-49.

* * * *

[However], we could not reconcile the jury's finding that all 15 of the remaining defendants demoted Jeffries based on their reasonable belief that the Albany speech would harm CUNY, with its later finding that the six Harleston defendants demoted Jeffries out of a malicious desire to violate his free speech rights, or at least in reckless disregard of these rights. Thus, we vacated the punitive damage awards against the six Harleston defendants.

* * * *

Upon the defendants' petition, the Supreme Court granted certiorari, vacated our judgment, and remanded with instructions to reconsider our opinion in light of *Waters*. See *Harleston*, 115 S. Ct. at 503.

DISCUSSION

One of the principles driving our earlier Jeffries decision was that the First Amendment protects a government employee who speaks out on issues of public interest from censure by his employer unless the speech actually disrupted the employer's operations. See *Jeffries*, 21 F.3d at 1245. We expressly held that a mere reasonable belief that the speech would interfere with the employer's operations is not enough to discipline an employee, unless the employee holds a high-level, policymaking position. See *id.* at 1246-47.

Applying that standard, we studied the Albany speech, and found that it squarely involved issues of public concern -- namely, the New York state public school curriculum, and black oppression throughout history. See *id.* at 1245-46. Then, after examining CUNY's bylaws, and the testimony of CUNY officials, we agreed with the district court that the position of Black Studies Chairman was a ministerial position at CUNY, and carried no policymaking authority. See *id.* at 1246-47. Thus, we held that the defendants bore the burden at trial to show that the speech actually interfered with CUNY operations. See *id.* at 1246. Given the jury's finding that the defendants had failed to make this showing, we held that the defendants had violated Jeffries' free speech rights. See *id.* at 1248.

At the time, the strict actual interference requirement reflected the law of the Second Circuit. See *Piesco v. City of New York*, 933 F.2d 1149, 1160 (2d Cir.) (if the speech "so clearly touches on matters of public concern, the government is required to demonstrate interference with the efficient functioning of the workplace"), cert. denied, 112 S. Ct. 331 (1991); see also *Rankin v. McPherson*, 483 U.S. 378, 390-91 (1987) (nature of employee's position determines whether the employee's speech "somehow undermines the mission of the public employer"). The recent *Waters* decision, however, has loosened *Piesco*'s shackles upon public employers.

I.

In *Waters*, a four-justice plurality held that the government could fire an employee for disruptive speech based on the government's reasonable belief of what the employee said, regardless of what was actually said. See *Waters*, 114 S. Ct. at 1887, 1889 (O'Connor, J., joined by Rehnquist, C.J., Souter and Ginsburg, JJ.). Here, however, there is no dispute as to what Jeffries actually said in the Albany speech. Accordingly, we need pursue only that part of *Waters* dealing with the disruptiveness of the speech.

The *Waters* plurality reiterated the test of *Connick v. Myers*, 461 U.S. 138 (1983), to determine when the First Amendment protects speech by a government employee:

> To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to the "'interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"

114 S. Ct. at 1884 (quoting *Connick*, 461 U.S. at 142 (quoting *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568 (1968))).

The plurality then explained that, in applying this test, the extent of the injury caused by the employee's speech need not be actual; rather, the government's burden is just to show that the speech threatened to interfere with government operations. See *id.* at 1887, 1890. It emphasized that greater deference must be given to the government when it acts as employer rather than as sovereign:

> We have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.
>
> ....
>
> [A] government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished.

Id. at 1887 (emphasis added); see also *United States v. Treasury Employees Union*, 115 S. Ct. 1003, 1018 n.21 (1995) (quoting *Waters* to reaffirm that deference is given to government's reasonable predictions of harm when used to justify the punishment of isolated incidents of employee speech).

We read the *Waters* plurality opinion to hold that the closer the employee's speech reflects on matters of public concern, the greater must be the employer's showing that the speech is likely to be disruptive before it may be punished. See *Treasury Employees Union*, 115 S. Ct. at 1021 (O'Connor, J., concurring in part, dissenting in part) ("As the magnitude of intrusion on employees' interests rises, so does the Government's burden of justification."). There is, thus, a proportion between the nature of the speech and the nature of the sanction that may ensue. Nevertheless, even when the speech is squarely on public issues, -- and thus earns the greatest constitutional protection -- *Waters* indicates that the government's burden is to make a substantial showing of likely interference and not an actual disruption. 114 S. Ct. at 1887.

II.

Whittled to its core, *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech. See *Waters*, 114 S. Ct. at 1887, 1889-91. By stressing that actual disruption is not required, *Waters* pulls a crucial support column out from under our earlier *Jeffries* opinion. We are now constrained to hold under *Waters* that the defendants did not violate Jeffries' free speech rights if: (1) it was reasonable for them to believe that the Albany speech would disrupt CUNY operations; (2) the potential interference with CUNY operations outweighed the First Amendment value of the Albany speech; and (3) they demoted Jeffries because they feared the ramifications for CUNY, or, at least, for reasons wholly unrelated to the Albany speech.

In the district court, the jury's central finding was that all 15 defendants were "motivated" to demote Jeffries by a "reasonable expectation" that the Albany speech would harm CUNY. This jury finding establishes that because the defendants were motivated by a reasonable prediction of disruption, they did not demote him for an improper retaliatory motive. Moreover, we hold that, as a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the Albany speech might have had. Under *Waters*, then, the jury's finding, if it stood alone, would suffice to show that none of the defendants violated Jeffries' free speech rights.

This finding does not stand alone, however. In response to later waves of interrogatories, the jury found that the six Harleston defendants (but -- significantly -- not the other nine) demoted Jeffries because of the Albany speech, and that they would not have done so if Jeffries had not given the speech. The jury then decided that the six Harleston defendants "acted with malicious intent to violate the plaintiff's rights...or with malicious intent to unlawfully injure him, or...with a callous or reckless disregard of the plaintiff's First Amendment rights." These later findings are tantamount to a determination that the six Harleston defendants demoted Jeffries in retaliation for his speech, and not to protect CUNY from the ramifications of his speech. See *Rankin*, 483 U.S. at 384 ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.").

* * * *

[Nevertheless,] elementary principles of causation compel the conclusion that Jeffries' First Amendment rights were not violated.

* * * *

The jury found that at least nine of the defendants, a clear majority, limited Jeffries' term because they expected his speech would harm CUNY (and not for invidious motives), and that this expectation was reasonable.

There is, moreover, no reasonable possibility that the six Harleston defendants tainted the vote with whatever retaliatory motives they may have had. Three of the six Harleston defendants voted against the proposal to limit Jeffries' term to one year; two of them were not Trustees, and thus could not vote; and one abstained. While Harleston and Reynolds were instrumental in putting the one-term issue on the Board's agenda, see *id.* at 1247, and may indeed have done so to punish Jeffries, the nine votes based on legitimate grounds constitute a superseding cause breaking the causal chain between the tainted motives (of Harleston and Reynolds) and the decision to limit Jeffries' term. See *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989) (superseding causes relieve defendants of section 1983 liability). And, to whatever extent any of the Harleston defendants inveighed against Jeffries and his speech at the Board meetings, the jury expressly found that these lamentations did not affect the nine Trustee defendants who based their votes on a reasonable expectation of harm. Thus, the motives of the Harleston defendants -- whatever they were -- did not cause a cognizable injury to Jeffries.

Finally, we note that an amicus curiae argues that we should not apply *Waters* at all because Jeffries, as a faculty member in a public university, deserves greater protection from state interference with his speech than did the nurse inWaters who complained about the obstetrics division of the hospital. We recognize that academic freedom is an important First Amendment concern. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). Jeffries' academic freedom, however, has not been infringed here. As we held in the earlier *Jeffries*, and as Jeffries himself has argued, the position of department chair at CUNY is ministerial, and provides no greater public contact than an ordinary professorship. See *Jeffries*, 21 F.3d at 1247. Jeffries is still a tenured professor at CUNY, and the defendants have not sought to silence him, or otherwise limit his access to the "marketplace of ideas" in the classroom. See *Keyishian*, 385 U.S. at 603.

CONCLUSION

Because the only defendants who voted in favor of limiting Jeffries' term did so constitutionally, and because the Harleston defendants did not contribute to the decision to limit Jeffries' term, we conclude that Jeffries has not suffered a deprivation of his constitutional rights.

We reverse the judgment of the district court, and remand with instructions to enter judgment for the defendants.

Notes and Questions

1. The prior *Jeffries* litigation is briefly discussed in *LHE*, section 3.7.5.1., p. 325. The *Waters* case is briefly discussed in *LHE*, section 3.7.6., p. 331. *Connick v. Myers*, the earlier U.S. Supreme Court case relied on in *Jeffries*, is discussed in *LHE*, section 3.7.1., p. 305.

2. As used by the *Jeffries* court, does the U.S. Supreme Court's decision in the *Waters* case have substantial impact on the development of first amendment law applicable to public employees? What effects will *Waters* have on the first amendment rights of higher education administrators and faculty? On the deference courts will accord to the judgments of public institutions? In light of these effects, do you think *Waters* is a "good" decision? *Jeffries*? Should *Waters* and *Connick*, cases involving public employees that do not work in higher education, be applied with full force to administrators and faculty members of public colleges and universities?

3. In an earlier case, *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992), the same appellate court that decided *Jeffries* had considered a faculty member's First Amendment claims against the same school (the City University of New York) that was involved in *Jeffries*. This case also

concerned off-campus statements, but the court ruled against the defendants. *Levin* is discussed in *LHE* section 3.7.3. Is *Levin* distinguishable from *Jeffries*? Is *Levin* still good law after *Jeffries*?

4. Notice how the *Jeffries* analysis shifts attention to the motivations of officers and trustees who take adverse action against an administrator or faculty member. Can we expect judges and juries to make reliable determinations concerning such issues? Can you see how to distinguish between "reasonable" beliefs or fears about disruption, and "improper retaliatory motive[s]"? How can a court decided whether a belief or "expectation" regarding disruption is "reasonable"? And how can a court determine whether "the potential interference with [university] operations outweigh[s] the First Amendment value of the...speech"? How did the *Jeffries* court make these determinations? Did it give these questions adequate consideration?

SEC. 3.7.7. Protection of Confidential Academic Information: "Academic Freedom Privilege."

University of Pennsylvania v. EEOC
493 U.S. 182; 110 S. Ct. 577 (1990)

OPINION: JUSTICE BLACKMAN delivered the opinion of the Court.

In this case we are asked to decide whether a university enjoys a special privilege, grounded in either the common law or the First Amendment, against disclosure of peer review materials that are relevant to charges of racial or sexual discrimination in tenure decisions.

I

The University of Pennsylvania, petitioner here, is a private institution. It currently operates 12 schools, including the Wharton School of Business, which collectively enroll approximately 18,000 full-time students.

In 1985, the University denied tenure to Rosalie Tung, an associate professor on the Wharton faculty. Tung then filed a sworn charge of discrimination with respondent Equal Employment Opportunity Commission (EEOC or Commission). App. 23. As subsequently amended, the charge alleged that Tung was the victim of discrimination on the basis of race, sex, and national origin, in violation of § 703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U.S.C. § 2000e-2(a) (1982 ed.), which makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

In her charge, Tung stated that the department chairman had sexually harassed her and that, in her belief, after she insisted that their relationship remain professional, he had submitted a negative letter to the University's Personnel Committee which possessed ultimate responsibility for tenure decisions. She also alleged that her qualifications were "equal to or better than" those of five named male faculty members who had received more favorable treatment. Tung noted that the majority of the members of her department had recommended her for tenure, and stated that she had been given no reason for the decision against her, but had discovered of her own efforts that the Personnel Committee had attempted to justify its decision "on the ground that the Wharton School is not interested in China-related research." App. 29. This explanation, Tung's charge alleged, was a pretext for discrimination: "simply their way of saying they do not want a Chinese-American, Oriental, woman in their school." *Ibid.*

The Commission undertook an investigation into Tung's charge and requested a variety of relevant information from petitioner. When the University refused to provide certain of that information, the Commission's Acting District Director issued a subpoena seeking, among other things, Tung's tenure-review file and the tenure files of the five male faculty members identified in the charge. *Id.*, at 21. Petitioner refused to produce a number of the tenure-file documents. It applied to the Commission for modification of the subpoena to exclude what it termed "confidential peer review information," specifically, (1) confidential letters written by Tung's evaluators; (2) the department chairman's letter of evaluation; (3) documents reflecting the internal deliberations of faculty committees considering applications for tenure, including the Department Evaluation Report summarizing the deliberations relating to Tung's application for tenure; and (4) comparable portions of the tenure-review files of the five males. The University urged the Commission to "adopt a balancing approach reflecting the constitutional and societal interest inherent in the peer review process" and to resort to "all feasible methods to minimize the intrusive effects of its investigations." Exhibit 2 to EEOC's Memorandum in Support of Application for Order to Show Cause 6.

The Commission denied the University's application. It concluded that the withheld documents were needed in order to determine the merit of Tung's charges. The Commission found:

> "There has not been enough data supplied in order for the Commission to determine whether there is reasonable cause to believe that the allegations of sex, race and national origin discrimination is [sic] true."

App. to Pet. for Cert. A31. The Commission rejected petitioner's contention that a letter, which set forth the Personnel Committee's reasons for denying Tung tenure, was sufficient for disposition of the charge. "The Commission would fall short of its obligation" to investigate charges of discrimination, the EEOC's order stated, "if it stopped its investigation once [the employer] has...provided the reasons for its employment decisions, without verifying whether that reason is a pretext for discrimination." *Id.*, at A32. The Commission also rejected petitioner's proposed balancing test, explaining that "such an approach in the instant case... would impair the Commission's ability to fully investigate this charge of discrimination." *Id.*, at A33. The Commission indicated that enforcement proceedings might be necessary if a response was not forthcoming within 20 days. *Ibid.*

The University continued to withhold the tenure-review materials. The Commission then applied to the United States District Court for the Eastern District of Pennsylvania for enforcement of its subpoena. The court entered a brief enforcement order.[1] *Id.*, at A35.

The Court of Appeals for the Third Circuit affirmed the enforcement decision. 850 F.2d 969 (1988).[2] Relying upon its earlier opinion in *EEOC v. Franklin and Marshall College*, 775 F.2d 110 (1985), cert. denied, 476 U.S. 1163 (1986), the court rejected petitioner's claim that policy considerations and First Amendment principles of academic freedom required the recognition of a qualified privilege or the adoption of a balancing approach that would require the Commission to demonstrate some particularized need, beyond a showing of relevance, to obtain peer review materials. Because of what might be thought of as a conflict in approach with the Seventh Circuit's decision in *EEOC v. University of Notre Dame du Lac,* 715 F.2d 331, 337 (1983), and because of the importance of the issue, we granted certiorari limited to the compelled-disclosure question. 488 U.S. 992 (1988), and amended, 490 U.S. 1015 (1989).

II

As it had done before the Commission, the District Court, and the Court of Appeals, the University raises here essentially two claims. First, it urges us to recognize a qualified common-law privilege against disclosure of confidential peer review materials. Second, it asserts a First Amendment right of "academic freedom" against wholesale disclosure of the contested documents.

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[1] Three days before the stated 20-day period expired, petitioner brought suit against the EEOC in the United States District Court for the District of Columbia seeking declaratory and injunctive relief and an order quashing the subpoena. App. 4. The Pennsylvania District Court declined to follow its controlling court's announced "first-filed" rule, which counsels the stay or dismissal of an action that is duplicative of a previously filed suit in another federal court. See *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 929 (CA3 1941), cert. denied, 315 U.S. 813 (1942); *Compagnie des Bauxites de Guinea v. Insurance Co. of North America*, 651 F.2d 877, 887, n. 10 (CA3 1981), cert. denied sub nom. *Compagnie des Bauxites de Guinee v. Insurance Corp. of Ireland, Ltd.*, 457 U.S. 1105 (1982). This declination, however, was upheld by the Third Circuit. See 850 F.2d 969, 972 (1988). Since the applicability of the "first-filed" rule to the facts of this case is not a question on which we granted certiorari, we do not address it.

[2] The Court of Appeals did not rule on the question whether the Commission's subpoena permits petitioner to engage in any redaction of the disputed records before producing them, because the District Court had not fully considered that issue. The Third Circuit therefore ordered that the case be remanded for further consideration of possible redaction. See *id.*, at 982.

With respect to each of the two claims, the remedy petitioner seeks is the same: a requirement of a judicial finding of particularized necessity of access, beyond a showing of mere relevance, before peer review materials are disclosed to the Commission.

A

Petitioner's common-law privilege claim is grounded in Federal Rule of Evidence 501. This provides in relevant part:

> "Except as otherwise required by the Constitution...as provided by Act of Congress or in rules prescribed by the Supreme Court..., the privilege of a witness...shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The University asks us to invoke this provision to fashion a new privilege that it claims is necessary to protect the integrity of the peer review process, which in turn is central to the proper functioning of many colleges and universities. These institutions are special, observes petitioner, because they function as "centers of learning, innovation and discovery." *Brief for Petitioner* filed June 23, 1989, p. 24 (hereinafter *Brief for Petitioner*).

We do not create and apply an evidentiary privilege unless it "promotes sufficiently important interests to outweigh the need for probative evidence...." *Trammel v. United States,* 445 U.S. 40, 51 (1980). Inasmuch as "testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public...has a right to every man's evidence,'" *id.*, at 50, quoting *United States v. Bryan,* 339 U.S. 323, 331 (1950), any such privilege must "be strictly construed." 445 U.S., at 50.

Moreover, although Rule 501 manifests a congressional desire "not to freeze the law of privilege" but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, *id.*, at 47, we are disinclined to exercise this authority expansively. We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself. Cf. *Branzburg v. Hayes,* 408 U.S. 665, 706 (1972). The balancing of conflicting interests of this type is particularly a legislative function.

With all this in mind, we cannot accept the University's invitation to create a new privilege against the disclosure of peer review materials. We begin by noting that Congress, in extending Title VII to educational institutional and in providing for broad EEOC subpoena powers, did not see fit to create a privilege for peer review documents.

When Title VII was enacted originally in 1964, it exempted an "educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." § 702, 78 Stat. 255. Eight years later, Congress eliminated that specific exemption by enacting § 3 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103. This extension of Title VII was Congress' considered response to the widespread and compelling problem of invidious discrimination in educational institutions. The House Report focused specifically on discrimination in higher education, including the lack of access for women and minorities to higher ranking (i. e., tenured) academic positions. See *H. R. Rep. No. 92-238*, pp. 19-20 (1971). Significantly, opponents of the extension claimed that enforcement of Title VII would weaken institutions of higher education by interfering with decisions to hire and promote faculty members[3]. Petitioner therefore cannot seriously contend that Congress was oblivious to concerns of academic autonomy when it abandoned the exemption for educational institutions.

The effect of the elimination of this exemption was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions. This Court previously has observed that Title VII "sets forth 'an integrated, multi-step enforcement procedure' that enables the Commission to detect and remedy instances of discrimination." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984), quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977). The Commission's enforcement responsibilities are triggered by the filing of a specific sworn charge of discrimination. The Act obligates the Commission to investigate a charge of discrimination to determine whether there is "reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b) (1982 ed.). If it finds no such reasonable cause, the Commission is directed to dismiss the charge. If it does find reasonable cause, the Commission shall "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." Ibid. If attempts at voluntary resolution fail, the Commission may bring an action against the employer. § 2000e-5(f)(1).[4]

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[3] See, e. g., 118 Cong. Rec. 311 (1972) (remarks of Sen. Ervin); *id.*, at 946 (remarks of Sen. Allen); *id.*, at 4919 (remarks of Sen. Ervin).

[4] Similarly, the charging party may bring an action after it obtains a "right-to-sue" letter from the Commission. § 2000e-5(f)(1).

To enable the Commission to make informed decisions at each stage of the enforcement process, § 2000e-8(a) confers a broad right of access to relevant evidence:

> "The Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated...that relates to unlawful employment practices covered by [the Act] and is relevant to the charge under investigation."

If an employer refuses to provide this information voluntarily, the Act authorizes the Commission to issue a subpoena and to seek an order enforcing it. § 2000e-9 (incorporating 29 U.S.C. § 161).

On their face, §§ 2000e-8(a) and 2000e-9 do not carve out any special privilege relating to peer review materials, despite the fact that Congress undoubtedly was aware, when it extended Title VII's coverage, of the potential burden that access to such material might create. Moreover, we have noted previously that when a court is asked to enforce a Commission subpoena, its responsibility is to "satisfy itself that the charge is valid and that the material requested is 'relevant' to the charge...and more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose." It is not then to determine "whether the charge of discrimination is 'well founded' or 'verifiable.'" *EEOC v. Shell Oil Co.*, 466 U.S., at 72, n. 26.

The University concedes that the information sought by the Commission in this case passes the relevance test set forth in Shell Oil. Tr. of Oral Arg. 6. Petitioner argues, nevertheless, that Title VII affirmatively grants courts the discretion to require more than relevance in order to protect tenure-review documents. Although petitioner recognizes that Title VII gives the Commission broad "power to seek access to all evidence that may be 'relevant to the charge under investigation,'" Brief for Petitioner 38 (emphasis added), it contends that Title VII's subpoena enforcement provisions do not give the Commission an unqualified right to acquire such evidence. *Id.*, at 38-41. This interpretation simply cannot be reconciled with the plain language of the text of § 2000e-8(a), which states that the Commission "shall...have access" to "relevant" evidence (emphasis added). The provision can be read only as giving the Commission a right to obtain that evidence, not a mere license to seek it.

Although the text of the access provisions thus provides no privilege, Congress did address situations in which an employer may have an interest in the confidentiality of its records. The same § 2000e-8 which gives the Commission access to any evidence relevant to its investigation also makes it "unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding" under the Act. A violation of this provision subjects the employee to criminal penalties. *Ibid.* To be sure, the protection of confidentiality that § 2000e-8(e) provides is less than complete[5]. But this, if anything, weakens petitioner's argument. Congress apparently considered the issue of confidentiality, and it provided a modicum of protection. Petitioner urges us to go further than Congress thought necessary to safeguard that value, that is, to strike the balance differently from the one Congress adopted. Petitioner, however, does not offer any persuasive justification for that suggestion.

We readily agree with petitioner that universities and colleges play significant roles in American society. Nor need we question, at this point, petitioner's assertion that confidentiality is important to the proper functioning of the peer review process under which many academic institutions operate. The costs that ensue from disclosure, however, constitute only one side of the balance. As Congress has recognized, the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. Few would deny that ferreting out this kind of invidious discrimination is a great, if not compelling, governmental interest. Often, as even petitioner seems to admit, see Reply Brief for Petitioner 15, disclosure of peer review materials will be necessary in order for the Commission to determine whether illegal discrimination has taken place. Indeed, if there is a "smoking gun" to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files. The Court of Appeals for the Third Circuit expressed it this way:

> "Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation. There may be evidence of discriminatory intent and of pretext in the confidential notes and memoranda which the [college] seeks to protect. Likewise, confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that some pattern of discrimination appears....The peer review material itself must be investigated to determine whether the evaluations are based in discrimination and whether they are reflected in the tenure decision." *EEOC v. Franklin and Marshall College*, 775 F.2d, at 116 (emphasis deleted).

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[5] The prohibition on Commission disclosure does not apply, for example, to the charging party. See *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 598-604 (1981).

Moreover, we agree with the EEOC that the adoption of a requirement that the Commission demonstrate a "specific reason for disclosure," see Brief for Petitioner 46, beyond a showing of relevance, would place a substantial litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination. Cf. *Branzburg v. Hayes*, 408 U.S., at 705-706. A university faced with a disclosure request might well utilize the privilege in a way that frustrates the EEOC's mission. We are reluctant to "place a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who wish instead to delay as long as possible investigations by the EEOC." *EEOC v. Shell Oil Co.*, 466 U.S., at 81.

Acceptance of petitioner's claim would also lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society. What of writers, publishers, musicians, lawyers? It surely is not unreasonable to believe, for example, that confidential peer reviews play an important part in partnership determinations at some law firms. We perceive no limiting principle in petitioner's argument. Accordingly, we stand behind the breakwater Congress has established: unless specifically provided otherwise in the statute, the EEOC may obtain "relevant" evidence. Congress has made the choice. If it dislikes the result, it of course may revise the statute.

> [The Court then rejected the University's claims that peer review documents were entitled to a privilege similar to that recognized by the Court for Presidential communications in *United States v. Nixon*, 418 U.S. 683 (1974) and for grand jury proceedings in *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211 (1979)].

* * * *

B

As noted above, petitioner characterizes its First Amendment claim as one of "academic freedom." Petitioner begins its argument by focusing our attention upon language in prior cases acknowledging the crucial role universities play in the dissemination of ideas in our society and recognizing "academic freedom" as a "special concern of the First Amendment." *Keyishian v. Board of Regents of University of New York*, 385 U.S. 589, 603 (1967). In that case the Court said:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." See also *Adler v. Board of Education of City of New York*, 342 U.S. 485, 511 (1952) (academic freedom is central to "the pursuit of truth which the First Amendment was designed to protect" (Douglas, J., dissenting)). Petitioner places special reliance on Justice Frankfurter's opinion, concurring in the result, in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), where the Justice recognized that one of "four essential freedoms" that a university possesses under the First Amendment is the right to "determine for itself on academic grounds who may teach" (emphasis added).

Petitioner contends that it exercises this right of determining "on academic grounds who may teach" through the process of awarding tenure. A tenure system, asserts petitioner, determines what the university will look like over time. "In making tenure decisions, therefore, a university is doing nothing less than shaping its own identity." *Brief for Petitioner* 19.

Petitioner next maintains that the peer review process is the most important element in the effective operation of a tenure system. A properly functioning tenure system requires the faculty to obtain candid and detailed written evaluations of the candidate's scholarship, both from the candidate's peers at the university and from scholars at other institutions. These evaluations, says petitioner, traditionally have been provided with express or implied assurances of confidentiality. It is confidentiality that ensures candor and enables an institution to make its tenure decisions on the basis of valid academic criteria.

Building from these premises, petitioner claims that requiring the disclosure of peer review evaluations on a finding of mere relevance will undermine the existing process of awarding tenure, and therefore will result in a significant infringement of petitioner's First Amendment right of academic freedom. As more and more peer evaluations are disclosed to the EEOC and become public, a "chilling effect" on candid evaluations and discussions of candidates will result. And as the quality of peer review evaluations declines, tenure committees will no longer be able to rely on them. "This will work to the detriment of universities, as less qualified persons achieve tenure causing the quality of instruction and scholarship to decline." *Id.*, at 35. Compelling disclosure of materials "also will result in divisiveness and tension, placing strain on faculty relations and impairing the free interchange of ideas that is a hallmark of academic freedom." *Ibid.* The prospect of these deleterious effects on American colleges and universities, concludes petitioner, compels recognition of a First Amendment privilege.

In our view, petitioner's reliance on the so-called academic-freedom cases is somewhat misplaced. In those cases government was attempting to control or direct the content of the speech engaged in by the university or those affiliated with it. In *Sweezy*, for example, the Court invalidated the conviction of a person found in contempt for refusing to answer questions about the content of a lecture he had delivered at a state university. Similarly, in *Keyishian*, the Court invalidated a network of state laws that required public employees, including teachers at state universities, to make certifications with respect to their membership in the Communist Party. When, in those cases, the Court spoke of "academic freedom" and the right to determine on "academic grounds who may teach" the Court was speaking in reaction to content-based regulation. See *Sweezy v. New Hampshire*, 354 U.S., at 250 (plurality opinion discussing problems that result from imposition of a "strait jacket upon the intellectual leaders in our colleges and universities"); *Keyishian v. Board of Regents*, 385 U.S., at 603 (discussing dangers that are present when a "pall of orthodoxy" is cast "over the classroom").

Fortunately, we need not define today the precise contours of any academic-freedom right against governmental attempts to influence the content of academic speech through the selection of faculty or by other means,[6] because petitioner does not allege that the Commission's subpoenas are intended to or will in fact direct the content of university discourse toward or away from particular subjects or points of view. Instead, as noted above, petitioner claims that the "quality of instruction and scholarship [will] decline" as a result of the burden EEOC subpoenas place on the peer review process.

Also, the cases upon which petitioner places emphasis involved direct infringements on the asserted right to "determine for itself on academic grounds who may teach." In *Keyishian*, for example, government was attempting to substitute its teaching employment criteria for those already in place at the academic institutions, directly and completely usurping the discretion of each institution. In contrast, the EEOC subpoena at issue here effects no such usurpation. The

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[6] Obvious First Amendment problems would arise where government attempts to direct the content of speech at private universities. Such content-based regulation of private speech traditionally has carried with it a heavy burden of justification. See, e. g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 98-99 (1972). Where, as was the situation in the academic-freedom cases, government attempts to direct the content of speech at public educational institutions, complicated First Amendment issues are presented because government is simultaneously both speaker and regulator. Cf. *Meese v. Keene*, 481 U.S. 465, 484, n. 18 (1987) (citing *Block v. Meese*, 253 U.S. App. D. C. 317, 327-328, 793 F.2d 1303, 1313-1314 (1986)). See generally, M. Yudof, *When Government Speaks* (1983).

Commission is not providing criteria that petitioner must use in selecting teachers. Nor is it preventing the University from using any criteria it may wish to use, except those -- including race, sex, and national origin -- that are proscribed under Title VII[7]. In keeping with Title VII's preservation of employers' remaining freedom of choice, see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), courts have stressed the importance of avoiding second-guessing of legitimate academic judgments. This Court itself has cautioned that "judges...asked to review the substance of a genuinely academic decision...should show great respect for the faculty's professional judgment." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985). Nothing we say today should be understood as a retreat from this principle of respect for legitimate academic decisionmaking.

That the burden of which the University complains is neither content based nor direct does not necessarily mean that petitioner has no valid First Amendment claim. Rather, it means only that petitioner's claim does not fit neatly within any right of academic freedom that could be derived from the cases on which petitioner relies. In essence, petitioner asks us to recognize an expanded right of academic freedom to protect confidential peer review materials from disclosure. Although we are sensitive to the effects that content-neutral government action may have on speech, see, e. g., *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981), and believe that burdens that are less than direct may sometimes pose First Amendment concerns, see, e. g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), we think the First Amendment cannot be extended to embrace petitioner's claim.

First, by comparison with the cases in which we have found a cognizable First Amendment claim, the infringement the University complains of is extremely attenuated. To repeat, it argues that the First Amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, and this in turn is central to the tenure process, which in turn is the means by which petitioner seeks to exercise its asserted academic-freedom right of choosing who will teach. To verbalize the claim is to recognize how distant the burden is from the asserted right.

Indeed, if the University's attenuated claim were accepted, many other generally applicable laws might also be said to infringe the First Amendment. In effect, petitioner says no more than that disclosure of peer review materials makes it more difficult to acquire information regarding the

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[7] Petitioner does not argue in this case that race, sex, and national origin constitute "academic grounds" for the purposes of its claimed First Amendment right to academic freedom. Cf. *Regents of University of California v. Bakke*, 438 U.S. 265, 312-313 (1978) (opinion of Powell, J.).

"academic grounds" on which petitioner wishes to base its tenure decisions. But many laws make the exercise of First Amendment rights more difficult. For example, a university cannot claim a First Amendment violation simply because it may be subject to taxation or other government regulation, even though such regulation might deprive the university of revenue it needs to bid for professors who are contemplating working for other academic institutions or in industry. We doubt that the peer review process is any more essential in effectuating the right to determine "who may teach" than is the availability of money. Cf. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (discussing how money is sometimes necessary to effectuate First Amendment rights).

In addition to being remote and attenuated, the injury to academic freedom claimed by petitioner is also speculative. As the EEOC points out, confidentiality is not the norm in all peer review systems. See, e.g., G. Bednash, *The Relationship Between Access and Selectivity in Tenure Review Outcomes* (1989) (unpublished Ph.D. dissertation, University of Maryland). Moreover, some disclosure of peer evaluations would take place even if petitioner's "special necessity" test were adopted. Thus, the "chilling effect" petitioner fears is at most only incrementally worsened by the absence of a privilege. Finally, we are not so ready as petitioner seems to be to assume the worst about those in the academic community. Although it is possible that some evaluators may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific examples and illustrations in order to deflect potential claims of bias or unfairness. Not all academics will hesitate to stand up and be counted when they evaluate their peers.

* * * *

Because we conclude that the EEOC subpoena process does not infringe any First Amendment right enjoyed by petitioner, the EEOC need not demonstrate any special justification to sustain the constitutionality of Title VII as applied to tenure peer review materials in general or to the subpoena involved in this case. Accordingly, we need not address the Commission's alternative argument that any infringement of petitioner's First Amendment rights is permissible because of the substantial relation between the Commission's request and the overriding and compelling state interest in eradicating invidious discrimination.[8]

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[8] We also do not consider the question, not passed upon by the Court of Appeals, whether the District Court's enforcement of the Commission's subpoena will allow petitioner to redact information from the contested materials before disclosing them. See n. 2, supra.

The judgment of the Court of Appeals is affirmed.
It is so ordered.

Notes and Questions

1. What are the bases for the University's claim of privilege? What showing would the University have to make in order to successfully make a claim of common law privilege?

2. Courts have typically been hostile to claims of privilege because parties are asking that otherwise relevant evidence be excluded from consideration. What public policy reason does the University advance to buttress its claim of privilege? How does the Court respond to this claim?

3. After this case, how can a college or university protect the confidentiality of the contents of a promotion or tenure file? Is there a difference, in legal terms, between external and internal evaluators, and their claims to confidentiality?

4. The laws of some states have been interpreted as requiring disclosure of otherwise confidential peer evaluation material; the latest judicial interpretation of a state open records law that opens tenure files is *State ex rel James v. Ohio State University*, 637 N.E.2d 911 (Ohio 1994). For a discussion of other state laws and their implications for confidentiality, see *LHE*, § 3.7.7., pp. 335-336.

SECS. 3.5, 3.6, 3.7. Standards and Criteria for Faculty Personnel Decisions; Procedures for Faculty Personnel Decisions; and *Faculty Academic Freedom.*

Problem 5

The Dean of the arts and sciences college at a public university has recommended that a professor in the college be denied tenure.

The tenured faculty in the professor's department, the Department of Social Sciences, has voted 4-1 to deny tenure. Before voting, they reviewed the professor's qualifications and performance at the university and met together with the department chairman to discuss the case. After the vote, they met with the professor at his request for an exchange of views about his candidacy for tenure, but after this meeting they declined to reconsider their earlier vote. The department chairman forwarded the tenured faculty's vote, and his own recommendation that the professor be denied tenure, to the Dean of the college. The chairman explained that the faculty had decided, and he agreed, that the professor did not fit into the "multi-disciplinary approach" followed by the department and "was better suited to a single discipline department such as economics." The Dean added her own recommendation to deny tenure.

The professor whose case is under consideration joined the faculty two years ago. Previously, he had been a tenured professor of economics at another university. He came to your university without tenure on the understanding he would be reviewed for tenure in his second year. The professor has been very critical of the curriculum prescribed by his department. To further his views, he ran for and was elected to his department's "Advisory Committee." Animosity developed between the professor and several "old" committee members who had not been re-elected. One of these replaced committee members accused the professor of leading a "conspiracy of new faculty members against those of us who have been here" and called it "a rotten or stinking fish." As this controversy brewed, the professor submitted his tenure application.

The case is now before the President. He may either: (1) affirm the recommendation to deny tenure and submit it to the Board of Trustees, (2) disagree with the recommendation and submit his own recommendation to grant tenure to the Board, or (3) return the case to the department with instructions for reconsideration. The professor has written the President requesting that he reject the department's and Dean's negative recommendations. The professor argues that "I am being ostracized because of my views," that "I have been denied every semblance of due process," and that "I will take every legal avenue open to me to right this egregious wrong."

Does the law constrain the President in his decision-making on this tenure application? How so? What steps should the President take next and why? What are the most major legal and policy considerations that should guide the ultimate decision in this case?

SEC. 3.8.1. Contractual Considerations.

Krotkoff v. Goucher College
585 F.2d 675 (4th Cir. 1978)

This case is set out on pp. 346-351 in *LHE*.

Notes and Questions

1. What standard must college administrators and trustees meet to demonstrate to a court's satisfaction that an institution is facing financial exigency?

2. What specific criteria did the college use to reach its layoff decision? What procedures? If you were an administrator or counsel for the college, would you have any criticism of the criteria or procedures, or suggest any changes?

3. What was the impact of the faculty committee's recommendation to retain *Krotkoff*? How does the court weigh it? Are there circumstances under which the college might be required to accept the faculty committee's recommendation?

4. *Krotkoff* argued that her tenured status required the college to find her another position and, if necessary, to provide her with the training necessary for a new position. To what extent and in what circumstances would an institution be required to do so before terminating a tenured faculty member? Just what does tenure mean in terms of the college's legal responsibilities to a faculty member in times of financial exigency or program discontinuance?

5. Could the college have dismissed Krotkoff and retained Ehrlich if Ehrlich had been nontenured?

6. Compare *Krotkoff*, a financial exigency case, with *Keppeler v. Board of Trustees of Community College District* #15, 688 P.2d 512 (Wash. Ct. App. 1984), a case concerning a college with a balanced budget. The court upheld the college's layoffs of tenured faculty because the college produced data demonstrating its inability to offer a comprehensive program in addition to maintaining services it had decided to discontinue.

SEC. 3.8. Staff Reduction Due to Financial Exigency and Program Discontinuance.

Problem 6

You are the president of a private college. Your student enrollment declined 20 percent between last year and this year, and the trustees are requiring you to "balance the budget" by reducing or closing programs and laying off faculty. What might the law require of you in such a situation? What documents or policies would determine the process to be used to make these decisions? What information would you collect or develop in anticipation of the litigation that is likely? What rights do the tenured faculty at your college have in these circumstances?

Would your responses be different if the college were public?

D.

CHAPTER IV: THE COLLEGE AND THE STUDENTS

SEC. 4.1.3. The Contractual Rights of Students.

Problem 7

You are the dean of the college of business at State University. Yesterday the chair of the accounting department advised you that an angry student would probably be asking to talk with you. The chair explained that the student had been told that she would not be able to graduate at the end of the spring semester because she had not taken a course required for all accounting majors--a course that is offered only during the fall semester. The chair explained that the student had been using "an old copy of the student handbook" and that the curriculum had changed since that version of the handbook had been published.

Today the student, Marcia Mapp, came to see you. Marcia explained that she had been admitted to the business school, an upper division undergraduate school, four years ago, and had completed the accounting program through the junior year. That summer she was seriously injured in an automobile accident, and had to take a leave of absence from State University. At the end of the past summer she returned to campus to seek advice on re-enrolling. None of the accounting professors were around, so she asked one of the department secretaries for help. The secretary, having worked in the accounting department for only two weeks, searched for a copy of the student handbook. Finding one dated three years earlier, the secretary let Marcia photocopy the pages that described the requirements for the accounting major. The secretary also helped Marcia register for courses so that when the fall semester started, she would not have to risk finding that the courses that she needed were full.

Student handbooks are given to all students who, in their sophomore year, seek to major in accounting and are accepted by the department. The accounting department changed the curriculum while Marcia was recovering from her injuries, and new handbooks were provided to all students currently registered in any accounting course. Marcia was readmitted through the registrar's office, and was told to see the department chair before registering for class -- but the department chair was on vacation when Marcia came to campus. Although the required course was offered during the fall semester, Marcia did not learn that she needed to take that course until near the end of the semester. Now she is seeking a waiver of the course requirement. The department chair has refused, stating that the Certified Public Accountant examination relies on material covered in that course, and that students who wish to sit for the CPA exam will not be allowed to do so unless they have taken the course.

Marcia says that she cannot afford to wait another six months to graduate, and has retained a lawyer. What would you, as dean of the college, do? Can Marcia prevail in a lawsuit? Should you try to persuade the department chair to change his mind?

SEC. 4.2.4.3. Disability.

Southeastern Community College v. Davis
442 U.S. 397 (1979)

This case is discussed on pp. 391-393 in *LHE*; see also sec. 7.5.4., p. 825 for other pertinent quotations. See also the discussion of *Doe v. New York University, Doherty v. Southern College of Optometry*, and *Wood v. President and Trustees of Spring Hill College*, discussed in *LHE* at pp. 394-398.

Notes and Questions

1. Would it have made a difference in the Court's reasoning, or in the outcome, had the hearing-impaired person applied for admission to a professional program that did not involve hands-on patient care, or a professional program that did not include a required clinical component? What difference and why?

2. Could the Court's reasoning extend to, and be used to justify the denial of admission to, a paraplegic nursing school applicant who is confined to a wheelchair? A nursing school applicant who has AIDS? Under what circumstances?

3. Suppose a blind person who has applied to a liberal arts college asks the college to waive its requirement that students successfully complete a two-semester course in physical education. This course emphasizes (and bases grades on) active participation and improvement of skills in sports such as tennis, golf, handball, archery, and softball. If the college refuses this request and denies admission because the applicant could not successfully complete the physical education course, would this denial be valid under the rationale of the *Davis* case?

4. It is important to differentiate between questions concerning whether an institution must admit an applicant with a disability and questions concerning how an institution must treat a student with a disability once admitted. Much of the reasoning in *Davis* speaks to questions

of the second type as well as those of the first type. For further discussion of the second type of question, see *LHE*, § 4.4., pp. 451-452, and § 7.5.4, pp. 823-825. See also *United States v. Board of Trustees for the University of Alabama*, discussed briefly in *LHE* pp. 393-394.

5. The *Davis* case provides an instructive illustration of the role of administrative agency regulations, and the legal relationship between such regulations and the statutes they implement. What role did regulations play in *Davis*? What role do they play in general? When will a court consider a regulation to be invalid? See generally *LHE* sec. 7.4.5.

SEC. 4.2.5. Affirmative Action Programs.

DeRonde v. Regents of University of California
28 Cal.3d 875, 625 P.2d 220 (1981)

This case is set out on pp. 409-413 in *LHE*.

Notes and Questions

1. How did King Hall's admissions process differ from the set-aside program criticized in *Bakke?* What is the legal significance of this difference?

2. Must an institution wishing to increase the proportion of minorities in its student body admit prior racial discrimination before it may make race-conscious decisions? Is simply trying to reverse the effects of past "societal" discrimination sufficient to defend a "reverse discrimination" lawsuit? For U.S. Supreme Court discussion of "societal discrimination" in the affirmative action context, see *Wygant v. Jackson School Board*, 106 S. Ct. 1842 (1986); *Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 722-728 (1989).

3. Much of DeRonde's argument addresses the issue of who is "qualified" to be admitted to law school. The court in *DeRonde* would have been assisted by the subsequent opinion of the U.S. Supreme Court in *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987), in which the Court upheld a gender-conscious promotion decision made under the authority of a voluntary affirmative action plan. The case is discussed in *LHE*, sec, 3.4., pp. 259-260.

4. Suppose the law school in this case had been part of a private university. Would a court hold the affirmative action plan of a private law school to the same legal standards of validity as in *DeRonde*? Would it matter whether or not the private law school or university received federal funds?

5. For an analysis of the implications of U.S. Supreme Court rulings on affirmative action for minority access to higher education, see M. Clague, "Legal Aspects of Minority Education," 21 *Education and Urban Society* 260-282 (1989).

SEC. 4.3.4. Minority Scholarships.

Podberesky v. Kirwan

38 F.3d 147 (4th Cir. 1994)

WIDENER, Circuit Judge:

The issue in this case is whether the University of Maryland at College Park may maintain a separate merit scholarship program that it voluntarily established for which only African- American students are eligible. Because we find that the district court erred in finding that the University had sufficient evidence of present effects of past discrimination to justify the program and in finding that the program is narrowly tailored to serve its stated objectives, we reverse the district court's grant of summary judgment to the University. We further reverse the district court's denial of Podberesky's motion for summary judgment, and we remand for entry of judgment in favor of Podberesky.

I

The facts and prior proceedings in this case are set forth at length in our earlier opinion, *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992) (*Podberesky I*). In sum, Daniel Podberesky challenges the University of Maryland's Banneker scholarship program, which is a merit-based program for which only African-American students are eligible. The University maintains a separate merit-based scholarship program, the Francis Scott Key program, which is not restricted to African-American students. Podberesky is Hispanic; he was therefore ineligible for consideration under the Banneker Program, although he met the academic and all other requirements for consideration. Podberesky was ineligible for consideration under the Key program because his academic credentials fell just shy of its more rigorous standards.

In our earlier decision, we remanded the case because the district court had not made a specific finding on whether there was sufficient present effect of the University's past discrimination against African Americans so as to justify the maintenance of the race-based restriction in the Banneker scholarship program. *Podberesky I*, 956 F.2d at 57. The district court allowed additional discovery to take place, after which cross-motions for summary judgment were filed. *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1076-77 (D. Md. 1993). The University claimed that four present effects of past discrimination exist at the University: (1) The University has a poor reputation within the African-American community; (2) African-Americans are underrepresented in the student population; (3) African-American students who enroll at the University have low retention and graduation rates; and (4) the atmosphere on campus is perceived as being hostile to African-American students. 838 F. Supp. at 1082. The district court reasoned that if a strong evidentiary basis existed to support any of the four present effects articulated by the University, the Banneker Program would be justified. The district court then found that there was a strong evidentiary basis to support the existence of each of those four present effects. 838 F. Supp. at 1083.

The district court also found that the Banneker Program was narrowly tailored to remedy those four present effects of past discrimination which it found at the University. 838 F. Supp. at 1094. The district court then granted the University's summary judgment motion and denied Podberesky's summary judgment motion. This appeal followed.

II

Because it chose the Banneker Program, which excludes all races from consideration but one, as a remedial measure for its past discrimination against African-Americans, the University stands before us burdened with a presumption that its choice cannot be sustained. As we have said before,

> "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."

Wygant v. Jackson Board of Education , 476 U.S. 267, 273, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (plurality opinion) (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 291, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (Powell, J.)). The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989). While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome....It thus remains our constitutional premise that race is an impermissible arbiter of human fortunes. *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072, 1076 (4th Cir. 1993) (parallel citations omitted).

[The appellate panel criticized the trial court for its "restlessness" in applying the strict scrutiny standard, its rejection of relevant precedent from other federal appellate courts, and its analysis of the statistical evidence presented by the plaintiff.]

* * * *

We have established a two-step analysis for determining whether a particular race-conscious remedial measure can be sustained under the Constitution: (1) the proponent of the measure must demonstrate a "'strong basis in evidence for its conclusion that remedial action [is] necessary;'" and (2) the remedial measure must be narrowly tailored to meet the remedial goal.[1] *Maryland Troopers*, 993 F.2d at 1076 (citing and quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (plurality opinion)). The purpose of our earlier remand in this case was to allow the district court to determine whether the University could prove that there were present effects of past discrimination which warranted such race conscious remedial action. *Podberesky I*, 956 F.2d at 56.

At the outset, we note that the district court held that any present effect of past discrimination found by the University would be sufficient under our *Maryland Troopers* decision and the Supreme Court's opinion in *City of Richmond v. J.A. Croson Co.* , 488 U.S. 469, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989), to justify the program: "UMCP's finding that the consequences of its segregative past continues to be felt ipso facto establishes the necessity for relief." 838 F. Supp. at 1094. However, *Croson* itself makes clear that the district court's assumption is incorrect. To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program. As to the effect justifying the remedial measure, "'absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" *Maryland Troopers*, 993 F.2d at 1076 (4th Cir. 1993) (quoting *Croson*, 488 U.S. at 493 (plurality opinion)). Therefore, the district court was incorrect in stating that if the University found strong evidence to support any of its proffered effects, the program would be justified. The effects must themselves be examined to see whether they were caused by the past discrimination and whether they are of a type that justifies the program. Only then could we consider affirming the district court's grant of summary judgment to the University on this issue.

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[1] The district court sets forth an alternate analysis that it thinks should be used instead of an analysis grounded in *Croson* and *Wygant*. 838 F. Supp. at 1097-99. We reject the district court's contention that its proposed analysis is the correct one.

A

Turning to the present effects articulated by the University, we disagree with the district court that the first effect, a poor reputation in the African-American community, and the fourth effect, a climate on campus that is perceived as being racially hostile, are sufficient, standing alone, to justify the single-race Banneker Program. As the district court's opinion makes clear, any poor reputation the University may have in the African-American community is tied solely to knowledge of the University's discrimination before it admitted African-American students. There is no doubt that many Maryland residents, as well as some citizens in other States, know of the University's past segregation, and that fact cannot be denied. However, mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books, there will be pro grams such as this one. Our decisions do not permit such a result. See, e.g., *Maryland Troopers*, 993 F.2d at 1079.

The hostile-climate effect proffered by the University suffers from another flaw, however. The main support for the University's assertion that the campus climate is hostile to African-American students is contained in a survey of student attitudes and reported results of student focus groups.[2] For an articulated effect to justify the program, however, there must be a connection between the past discrimination and the effect. *United States v. Fordice*, 120 L. Ed. 2d 575, 60 U.S.L.W. 4769, 4772 n.4, 112 S. Ct. 2727 (U.S. 1992). The district court recognized this and reasoned that there was a nexus because racial incidents have occurred with some frequency and regularity, which the district court called a "stream," 838 F. Supp. at 1092, since 1970, which is when the district court found that de facto segregation ended at the University. The district court found that "the very nature of the college experience is that younger students learn from older ones....Since 1970, both black and white students have been handing down racial attitudes that perpetuate a hostile racial climate." 838 F. Supp. at 1093. The district court appears to have found the connection between the University's previous discriminatory acts and the present attitudes obvious, but we have not so found it. The frequency and regularity of the incidents, as well as claimed instances of backlash to remedial measures, do not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination, which the district court implicitly held.

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[2] The hostile climate is claimed to manifest itself in the student newspaper, the fraternity and sorority system, and in the fact that students tend to segregate themselves in classrooms, social situations, and the dining halls. In addition, there have been claimed instances of racist and patronizing comments by faculty members. Some instances of white and black backlash have occurred when the University has either implemented or trimmed minority-student programs. See 838 F. Supp. at 1092-93.

Podberesky argues that the claimed hostility did not have its genesis in the University's discriminatory acts of the past. He points to several northern universities that suffer from comparable racial problems.[3] The district court rejected this argument for the reason that it found that most northern universities had experienced de facto segregation, and it held that racial hostility on the northern universities' campuses was the present effect of those universities' past de facto, not de jure, discrimination. 838 F. Supp. at 1090-91.

The district court's analysis cannot be sustained on this point. When we begin by assuming that every predominately white college or university discriminated in the past, whether or not true, we are no longer talking about the kind of discrimination for which a race conscious remedy may be prescribed. Instead, we are confronting societal discrimination, which cannot be used as a basis for supporting a race-conscious remedy. *Podberesky I*, 956 F.2d at 55 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (plurality opinion)). There is no doubt that racial tensions still exist in American society, including the campuses of our institutions of higher learning. However, these tensions and attitudes are not a sufficient ground for employing a race-conscious remedy at the University of Maryland. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (majority opinion).

B

We next turn to the two effects that rely on statistical data: underrepresentation of African-American students at the University and low retention and graduation rates for African-American students. The district court found that there was strong evidence of African-American underrepresentation in the University's entering-student classes. With respect to the low retention and graduation rates, the district court found that the statistics showed that African-American students had higher attrition rates than any other identifiable group on campus.

The district court erred in its analysis of the underrepresentation evidence and the attrition evidence for a fundamental reason: the posture of the case before the district court was that cross-motions for summary judgment had been filed. We review grants of summary judgment de novo. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988).

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[3] [Footnote omitted].

* * * *

Taking the facts in the light most favorable to Podberesky, the nonmoving party, we find that the district court erred in granting the University's motion for summary judgment. As to the low retention and graduation rates, there is a dispute in the evidence about why African-American students leave the University of Maryland in greater numbers than other students. Podberesky offered evidence tending to show that the attrition rate revealed by the statistics was the result of economic and other factors and not because of past discrimination. The district court rejected Podberesky's study by reasoning that economic concerns are often more pressing for African-American students because many of those students come from less wealthy backgrounds. The district court then reasoned that the disproportionate number of less wealthy African-American families is the result of past discrimination in society. The district court also found some evidence in some of the University's exhibits that showed that the University's poor reputation and hostile climate have an effect on attrition rates. 838 F. Supp. at 1091-92.

As to the underrepresentation, our decisions and those of the Supreme Court have made clear that the selection of the correct reference pool is critical. The district court must first determine as a matter of law whether it is appropriate to apply a pool consisting of the local population or whether another pool made up of people with special qualifications is appropriate. In the employment context, this determination is made by looking at the job requirements. If the job is an unskilled one, the general population is more likely the relevant pool. If, however, the job requires some special skills or training, the relevant pool is made up of only those people who meet the criteria. E.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 631-32, 94 L. Ed. 2d 615, 107 S. Ct. 1442 (1987); *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072, 1076-77 (4th Cir. 1993). The method of determining the relevant pool by looking at the qualifications needed to take advantage of the opportunity from which minorities historically have been excluded and the prevalence of those qualifications in the population is not limited to the employment context. See *City of Richmond v. J.A. Croson Co.* , 488 U.S. 469, 501-02, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (majority opinion) (applying analysis to Richmond's minority set-aside program).

The district court rejected a pool which consisted of all graduating high school seniors because that pool "does not take into account even flexible minimum admission requirements." 838

F. Supp. at 1089. Thus, the district court correctly determined the legal issue of whether the appropriate pool was the general population or a smaller qualification specific pool. The district court erred, however, in its attempt to resolve the factual dispute[4] about what are the effective minimum admission criteria.[5] The district court declined to decide the requisite qualification for membership in the reference pool, but mentioned the percentage of students taking the SAT in Maryland, the minimum course curriculum required, and minimum math and verbal SAT scores. It later found that the percentage of African-American incoming freshmen at UMCP (13%) was less than any of them (17.9% for required course curriculum to 22% of students taking the SAT in Maryland who were African-American).[6] 838 F. Supp. at 1088-1089. It rejected Podberesky's proposed effective minimum criterion for admission, which was based on a combination of SAT scores, high school curriculum requirements, and grade-point averages, because the use of those numbers "ignores the variables in the admissions process and the intergenerational effects of segregated education on the applicant pool." 838 F. Supp. at 1089.[7] We are of opinion that the goal of the program, remedying any present effects of past discrimination, cannot be used to lower the effective minimum criteria needed to determine the applicant pool.[8] Additionally, the district court erred in resolving, on a summary judgment motion, the factual dispute about the effective minimum criteria for admission.

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[4] The district court also should have determined as a matter of fact that part of the population which possessed the qualifications. In this case, however, the number of students meeting the criteria advocated by Podberesky was not determined because the University did not submit sufficient data to allow the corresponding percentage to be determined. The fact that the numbers are not in the record is not a sufficient basis, however, for rejecting the pool. The pool must be determined based on the qualifications, not by determining which numbers exist in the record and then adopting the corresponding qualifications, which is one way of characterizing what occurred in the district court. The district court could have denied the University's motion for summary judgment and given it more time to come up with the relevant figures.

The above note and associated text assumes the statistical validity of any pool. See Part III.C., *infra*.

[5] The University has no formal requirements for admission with respect to SAT scores and grade-point averages (GPA). Thus, for the years in question, the district court should have determined what the effective minimum criteria for admission were by determining the lowest GPA and SAT scores achieved by admittees to the University that year.

[6] The district court also rejected several pools advocated by the University, including a pool of all African-American students graduating from Maryland high schools. 838 F. Supp. at 1089.

[7] Like the University, Podberesky presented several possible pools to the district court. As to the qualifications needed to be eligible for admission, Podberesky argued in part that the appropriate reference pool consisted of those African-Americans who completed the required high school curriculum, maintained a grade-point average of 2.0 or above, attained a verbal SAT score of 270 or better, and attained a math SAT score of 380 or better. Podberesky contends that the University's admissions data reveal that these were the effective minimum criteria for admission. 838 F. Supp. at

The factual disputes in this case are not inconsequential and could have been resolved only at trial. A district court may not resolve conflicts in the evidence on summary judgment motions, and the district court erred in so doing here.

III

[The court then reviewed the district court's denial of Podberesky's motion for summary judgment and its granting of summary judgment to the University.]

* * * *

Even if we assumed that the University had demonstrated that African-Americans were underrepresented at the University and that the higher attrition rate was related to past discrimination,[9] we could not uphold the Banneker Program. It is not narrowly tailored to remedy the underrepresentation and attrition problems, and the district court erred in its analysis of this issue as well.

It is difficult to determine whether the Banneker scholarship program is narrowly tailored to remedy the present effects of past discrimination when the proof of present effects is so weak. See *Croson*, 488 U.S. at 507 (majority opinion). In determining whether the Banneker Program is narrowly tailored to accomplish its stated objective, we may consider possible race-neutral alternatives and whether the program actually furthers a different objective from the one it is claimed

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1087.

[8] In addition, any intergenerational effects of segregated education are the product of societal discrimination, which cannot support a program such as this one. *Maryland Troopers*, 993 F.2d at 1076 (citing *Wygant*, 476 U.S. at 274-76 (plurality opinion)).

[9] We do not discuss here the hostile environment and poor reputation effects because they are not sufficient to justify the program. See Part II.A, *supra*.

to remedy.[10] See *Croson*, 488 U.S. at 507.

A. Attraction to Only High-Achieving Black Students

The district court found that the Banneker Program attracted "high-achieving black students" to the University, which "directly increases the number of African-Americans who are admitted and likely to stay through graduation. Even more importantly, the Program helps to build a base of strong, supportive alumni, combat racial stereotypes and provide mentors and role models for other African-American students. Continuation of the Program thus serves to enhance [the University's] reputation in the African-American community, increase the number of African-American students who might apply to the University, improve the retention rate of those African-American students who are admitted and help ease racial tensions that exist on campus." 838 F. Supp. at 1094-95. In sum, the district court found that the Banneker Program is employed by the University as an effective recruiting tool that draws high-achieving African-Americans to the University. The district court further noted that the University's "success in curing the vestiges of its past discrimination depends upon it attracting high-achieving African-Americans to the College Park campus. " 838 F. Supp. at 1095. As we demonstrate below, in conducting its analysis, the district court did not sufficiently connect the problems the University purports to remedy to the Banneker Program: low retention and graduation rates and underrepresentation. If the purpose of the program was to draw only high-achieving African-American students to the University, it could not be sustained. High achievers, whether African-American or not, are not the group against which the University discriminated in the past.

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[10] Because the Banneker requirement of African descent does not establish the same kind of racial quota as a 50% promotion requirement, the tests articulated in Justice Brennan's plurality opinion and Justice Powell's concurring opinion in *United States v. Paradise*, 480 U.S. 149, 171 & 187, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987), and adopted by this circuit in *Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207, 216 (4th Cir. 1993), may need some slight adjustment when applied in the context of a raceexclusive minority scholarships case. Although *Croson*, too, involved an outright racial quota--a 30% minority business enterprise set-aside--it also involved a claim of present effects of past discrimination. Therefore, we will consider the factors that the Court used in *Croson*. We note, however, that even if we were to apply the five-factor Hayes test, the program would not withstand scrutiny under those factors, either.

B. Including Non-Residents of Maryland

The district court also erred in giving no weight to Podberesky's argument that the Banneker Program is not narrowly tailored because the scholarships are open to non-Maryland residents.[11] The district court stated that the goals of the program would be served "whether Banneker Scholars are Maryland natives or not." 838 F. Supp. at 1095 n.74. It is at once apparent that the Banneker Program considers all African-American students for merit scholarships at the expense of non-African-American Maryland students.

The University, throughout this case, has taken the position that the pool from which the students eligible to enter UMCP is drawn are from "qualified African-American high school students in Maryland," A. 3476, and "the University expects that the racial composition of its student body will reflect the racial composition of qualified college eligible high school graduates." A. 3476. While all of the prerequisites for membership in the pool were a matter of dispute between the parties, that the University measured its desired number of black students against Maryland high school graduates who are qualified to attend the University is not a matter of dispute. That being true, it is obvious that awarding Banneker Scholarships to non-residents of Maryland is not narrowly tailored to correcting the condition that the University argues, that not enough qualified African-American Maryland residents attend at College Park. Cf. *Croson*, 488 U.S. at 508.

C. Arbitrary Reference Pool

The district court found the program to be narrowly tailored to increasing representation because an increase in the number of high achieving African-American students would remedy the underrepresentation problem. The district court so found because it reasoned that the Banneker Scholars would serve as mentors and role models for other African-American students, thereby attracting more African-American students. The Supreme Court has expressly rejected the role-model theory as a basis for implementing a race-conscious remedy, as do we. *Wygant v. Jackson Bd. of Educ.* , 476 U.S. 267, 276, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (plurality opinion).

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[11] In 1992, for example, 17 of the 31 Banneker scholarships were awarded to non-residents of Maryland. Podberesky says without refutation that in 1989 a Banneker scholarship was offered to a Jamaican. Thus, the University gives African-American a hemispheric meaning.

Furthermore, the district court's analysis of underrepresentation, although it relied on various academic criteria to determine eligibility, relied on each relevant criterion item by item instead of in combination. It is axiomatic that if all of the relevant criteria (270 verbal SAT score, 380 math SAT score, UMCP general course-curriculum requirements, and 2.0 GPA) were applied simultaneously, as indeed UMCP itself claims it most commonly does in determining admissions qualifications, the percentage of eligible Maryland residents who are African-American might well be significantly lower than the percentage satisfying the least burdensome of those criteria relied upon.[12] In other words, even within the confines of its own analysis, the district court's conclusion is based on flawed reasoning, and results in a series of inconclusive and possibly inflated figures regarding the makeup of the reference pool.

Moreover, and more important, eligibility is not the only relevant criterion in determining the reference pool in this case. We note the critical fact that application for admission to college is voluntary rather than obligatory. In addition, the choice of which institution to attend is voluntary, and is dependent upon many variables other than race-based considerations. Further, economic concerns and other factors, offered by Podberesky below, may induce many otherwise eligible African-American high school graduates not to enter college in numbers which are proportionately higher than those of their nonAfrican-American peers.

In short, the district court failed to account for statistics regarding that percentage of otherwise eligible African-American high school graduates who either (1) chose not to go to any college; (2) chose to apply only to out-of-state colleges; (3) chose to postpone application to a four-year institution for reasons relating to economics or otherwise, such as spending a year or so in a community college to save money; or (4) voluntarily limited their applications to Maryland's predominantly African-American institutions.[13] What if, for example, in some year only 2/3 of those academically eligible African-American Maryland high school graduates applied to any college, while 90% of eligible non-African-American Maryland high school graduates did? What then would be the relevance of measuring the percentage of those eligible against the percentage of African-Americans in the UMCP student body?

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[12] This is because the least burdensome criterion for admission to UMCP is a limiting factor: no greater number of people can be accepted to UMCP than those satisfying this criterion, whichever one it is, in any given year. In point of fact, many of those satisfying this least burdensome criterion will fail to satisfy some or all of the other criteria, and thus will not be eligible to attend UMCP. Accordingly, the district court's failure to determine what percentage of the Maryland high school graduates were African-American and also satisfied all of these criteria, may well have inflated its determinations of the size of the relevant reference pool.

[13] We can infer that significant numbers of UMCP-eligible Maryland African-Americans do choose to go to the predominantly African-American Maryland schools, such as Coppin State, Bowie State, and UM Eastern Shore, whether their reasons are economic, academic, geographic, or cultural, because the percentages of African-Americans in the student bodies at those schools are so high.

We will not speculate as to what extent these variables might reduce the size of the reference pool, since no definitive information regarding these types of statistics is in the record.[14] We can say with certainty, however, that the failure to account for these, and possibly other, nontrivial variables cannot withstand strict scrutiny. In analyzing underrepresentation, disparity between the composition of the student body and the composition of a reference pool is significant in this case only to the extent that it can be shown to be based on present effects of past discrimination. In more practical terms, the reference pool must factor out, to the extent practicable, all nontrivial, non-racebased disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity. This the district court simply has not done. The result is no more than a collection of arbitrary figures upon which it held UMCP may rely in its efforts to recruit African-Americans using facially racial classifications.

The Supreme Court has stated in *Croson*, which involved a 30% racial set-aside quota, that "the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Croson*, 488 U.S. at 507. Although the percentage of African-Americans that was expected to be in each entering class was disputed, see *supra* Part II.B., it is clear that the district court has implicitly approved the use by UMCP of a similar quota, because it "rests on . . . unsupported assumptions," *Croson*, 488 U.S. at 502, as to the appropriate levels, if any, to remedy the present effects of past discrimination.

The district court has approved the use of the Banneker Program to affirmatively admit African-American students solely on the basis of race until the composition of African-Americans on the University campus reflects the percentage of African-American Maryland high school graduates who potentially might participate in higher education at UMCP, without an accurate determination of either the extent to which the present disparity exists, see *supra*, or the extent to which that disparity flows from past discrimination, see *supra* part I. The program thus could remain in force indefinitely based on arbitrary statistics unrelated to constitutionally permissible purposes. Without specific determination of what measure should be used, if any, to remedy the effects of past discrimination that still exist, "'relief...could extend until the percentage of [African-American students at UMCP] mirrored the percentage of [African-Americans] in the population as a whole." *Croson*, 488 U.S. at 498. We are thus of opinion that, as analyzed by the district court, the program more resembles outright racial balancing than a tailored remedy program. As such, it is not narrowly tailored to remedy past discrimination. In fact, it is not tailored at all.

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[14] Although it is not necessary to this analysis, because the district court's conclusion on this point cannot withstand strict scrutiny for failure altogether to consider these variables, we are convinced, based on common sense and what evidence there is in the record, that if these variables were accounted for in determining the relevant reference pool, the percentage of African-Americans in that pool would be lower than any figure postulated by the district court, and the disparity between UMCP's African-American population and that of the reference pool would be correspondingly reduced to a point where there might well be no statistically significant underrepresentation.

D. Race-Neutral Alternatives

The district court also suggested that an increase in the number of high-achieving African-American students would remedy the low retention and graduation rates for African-American students at the University. Podberesky submitted a 1993 study by two University of Maryland professors which indicates that after the freshman year, in which grades are the principal problem, students leave the University for financial and other reasons.[15] Specifically, students who left the University "tended to be more likely to provide their own expenses, live off campus with long commutes, have a job with long hours, spend few free hours on campus, and have few friends on campus." Roger W. McIntire & Sandra Smith, "Work and Life Styles Among Dropouts and Ongoing College Students," 4 *J.A.* 1062, 1067 (survey of 455 drop-out and 455 returning University of Maryland students). "Males, minority groups and transfer students show greater attrition because they are more likely to provide their own expenses and have little time for campus activities and friends due to off campus living and work." 4 *J.A.* at 1068. That study suggests that the best remedy is "campus job opportunities and convenient, attractive, and economically reasonable campus housing ...available to a greater proportion of students." 4 *J.A.* at 1070-71.

The district court rejected Podberesky's argument because it found that, in addition to economic hardship, in given cases an absence of commitment to the school because of its poor reputation in the community from which a student comes, the lack of shared experience with family members to help the student through the arduous process of higher education, the absence of African-American members of the faculty to serve as mentors and the existence of a hostile racial atmosphere on campus are other significant contributing factors. 838 F. Supp. at 1091-92.

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[15] Students participating in the survey were asked to check a list of factors that were factors in their decisions to leave the University. We note that the students had the opportunity to choose that they "felt discriminated against due to race, gender, religion, or sexual preference." 4 J.A. at 1075.

The causes of the low retention rates submitted both by Podberesky and the University and found by the district court have little, if anything, to do with the Banneker Program. To the extent that the district court's opinion can be read as having found a connection between the University's poor reputation and hostile environment and the Banneker Program, it is on either a role model theory or a societal discrimination theory, neither of which can be sustained. In addition, there is no connection between the Banneker Program and shared experience with family members, African-American faculty members, or jobs and housing. Even if there is some connection between the two, the University has not made any attempt to show that it has tried, without success, any race-neutral solutions to the retention problem. Thus, the University's choice of a race-exclusive merit scholarship program as a remedy cannot be sustained.

Because we find that the University has not shown that its programs and quota goals are narrowly tailored, we reverse the district court's grant of summary judgment to the University. We also reverse the district court's denial of Podberesky's summary judgment motion.

* * * *

The University has had two opportunities to justify its position and has failed.

Accordingly, on remand, the district court will enter its order denying the University's motion for summary judgment, granting Podberesky's motion for summary judgment, and requiring the University to re-examine Podberesky's admission to the Banneker Program as of the date it was made. On such re-examination, the University will be enjoined from enforcing that part of the qualifications for entry into the Banneker Program which require that the applicant be of the African-American race. Following such re-examination, the district court will award appropriate relief if required.

The judgment of the district court is vacated, and the case is remanded for action consistent with this opinion.

VACATED AND REMANDED WITH INSTRUCTIONS.[*]

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[*] Podberesky has not asked for relief against the intervenors who have been awarded Banneker scholarships prior to this decision; therefore, none will be awarded against them except taxable costs and attorneys fees. Podberesky, also, has not asked for relief against any other student who has been awarded a Banneker scholarship prior to this decision; therefore, this decision has no effect on such students. We note that attorneys' fees are not awarded as a matter of course against unsuccessful intervenors, see *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), and we express no opinion as to whether or not the district court should make such an award on remand.

Notes and Questions

1. Proceedings in *Podberesky* prior to the 1994 Fourth Circuit opinion are discussed in *LHE* at pp. 431-432.

2. The court characterizes the racial tensions on campus and the underrrepresentation of African-American students as the result of "societal discrimination," rather than as the present effects of the university's past discrimination. For a discussion of U.S. Supreme Court treatment of "societal discrimination," see *LHE* p. 262. Apart from the evidence presented by the University of Maryland, is there any argument that could convincingly link prior de jure discrimination with current problems encountered by African-American (and other minority) students on college campuses?

3. The University proffered another justification for the program's constitutionality: the recipients of the scholarships would serve as role models for other African-American students. Note the Supreme Court's reaction to the role model theory in *Wygant v. Jackson*, discussed in *LHE* at pp. 262-263.

4. The appellate panel also criticized the district court's acceptance of the University's argument that only Maryland high school graduates should constitute the reference pool. The issue of the relevant pool for comparison purposes in discrimination litigation has arisen frequently in the employment context. See *Hazelwood School District v. United States*, 433 U.S. 299, 306-309 (1977). If the University had used all high school graduates, rather than just Maryland high school graduates, would the court have reached a different conclusion about the program?

5. After *Podberesky*, (in any jurisdiction that follows *Podberesky*), on what grounds might a public college or university justify a race-exclusive scholarship program? Assuming that the institution no longer engages in *de jure* or *de facto* discrimination against racial or ethnic minority students, do any grounds remain to uphold these programs? How about scholarship programs that are not raced-exclusive but use race as one of the factors to consider in making awards -- could such programs be constitutional after *Podberesky*? Under what circumstances?

SEC. 4.7.1. Awarding of Grades and Degrees.

Regents of the University of Michigan v. Ewing

474 U.S. 214; 106 S. Ct. 507 (1985)

JUSTICE STEVENS delivered the opinion of the Court.

Respondent Scott Ewing was dismissed from the University of Michigan after failing an important written examination. The question presented is whether the University's action deprived Ewing of property without due process of law because its refusal to allow him to retake the examination was an arbitrary departure from the University's past practice. The Court of Appeals held that his constitutional rights were violated. We disagree.

I

In the fall of 1975 Ewing enrolled in a special 6-year program of study, known as "Inteflex," offered jointly by the undergraduate college and the Medical School.[1] An undergraduate degree and a medical degree are awarded upon successful completion of the program. In order to qualify for the final two years of the Inteflex program, which consist of clinical training at hospitals affiliated with the University, the student must successfully complete four years of study including both premedical courses and courses in the basic medical sciences. The student must also pass the "NBME Part I" -- a 2-day written test administered by the National Board of Medical Examiners.

In the spring of 1981, after overcoming certain academic and personal difficulties, Ewing successfully completed the courses prescribed for the first four years of the Inteflex program and thereby qualified to take the NBME Part I. Ewing failed five of the seven subjects on that examination, receiving a total score of 235 when the passing score was 345. (A score of 380 is required for state licensure and the national mean is 500.) Ewing received the lowest score recorded by an Inteflex student in the brief history of that program.

On July 24, 1981, the Promotion and Review Board individually reviewed the status of several students in the Inteflex program. After considering Ewing's record in some detail, the nine members of the Board in attendance voted unanimously to drop him from registration in the program.

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[1] The Inteflex program has since been lengthened to seven years.

In response to a written request from Ewing, the Board reconvened a week later to reconsider its decision. Ewing appeared personally and explained why he believed that his score on the test did not fairly reflect his academic progress or potential.[2] After reconsidering the matter, the nine voting members present unanimously reaffirmed the prior action to drop Ewing from registration in the program.

In August, Ewing appealed the Board's decision to the Executive Committee of the Medical School. After giving Ewing an opportunity to be heard in person, the Executive Committee unanimously approved a motion to deny his appeal for a leave of absence status that would enable him to retake Part I of the NBME examination. In the following year, Ewing reappeared before the Executive Committee on two separate occasions, each time unsuccessfully seeking readmission to the Medical School. On August 19, 1982, he commenced this litigation in the United States District Court for the Eastern District of Michigan.

II

Ewing's complaint against the Regents of the University of Michigan asserted a right to retake the NBME Part I test on three separate theories, two predicated on state law and one based on federal law.[3] As a matter of state law, he alleged that the University's action constituted a breach of contract and was barred by the doctrine of promissory estoppel. As a matter of federal law, Ewing alleged that he had a property interest in his continued enrollment in the Inteflex program and that his dismissal was arbitrary and capricious, violating his "substantive due process rights" guaranteed by the Fourteenth Amendment and entitling him to relief under 42 U. S. C. § 1983.

The District Court held a 4-day bench trial at which it took evidence on the University's claim that Ewing's dismissal was justified as well as on Ewing's allegation that other University of Michigan medical students who had failed the NBME Part I had routinely been given a second opportunity to take the test. The District Court described Ewing's unfortunate academic history in some detail. Its findings, set forth in the margin,[4] reveal that Ewing "encountered immediate difficulty in handling the work," *Ewing v. Board of Regents*, 559 F.Supp. 791, 793 (1983), and that his difficulties -- in the form of marginally passing grades and a number of incompletes and makeup examinations, many experienced while Ewing was on a reduced course load -- persisted throughout the 6-year period in which he was enrolled in the Inteflex program.

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[2] At this and later meetings Ewing excused his NBME Part I failure because his mother had suffered a heart attack 18 months before the examination; his girlfriend broke up with him about six months before the examination; his work on an essay for a contest had taken too much time; his makeup examination in pharmacology was administered just before the NBME Part I; and his inadequate preparation caused him to panic during the examination.

[3] A fourth count of Ewing's complaint advanced a claim for damages under 42 U. S. C. § 1983. The District Court held that the Board of Regents is a state instrumentality immunized from liability for damages under the Eleventh Amendment, and dismissed this count of the complaint. *Ewing v. Board of Regents*, 552 F.Supp. 881 (ED Mich. 1982).

Ewing discounted the importance of his own academic record by offering evidence that other students with even more academic deficiencies were uniformly allowed to retake the NBME Part I. See App. 107-111. The statistical evidence indicated that of the 32 standard students in the Medical School who failed Part I of the NBME since its inception, all 32 were permitted to retake the test, 10 were allowed to take the test a third time, and 1 a fourth time. Seven students in the Inteflex program were allowed to retake the test, and one student was allowed to retake it twice. Ewing is the only student who, having failed the test, was not permitted to retake it. Dr. Robert Reed, a former Director of the Inteflex program and a member of the Promotion and Review Board, stated that students were "routinely" given a second chance. 559 F.Supp., at 794. Accord, App. 8, 30, 39-40, 68, 73, 163. Ewing argued that a promotional pamphlet released by the Medical School approximately a week before the examination had codified this practice. The pamphlet, entitled "On Becoming a Doctor," stated:

> "According to Dr. Gibson, everything possible is done to keep qualified medical students in the Medical School. This even extends to taking and passing National Board Exams. Should a student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam." *Id.*, at 113.

The District Court concluded that the evidence did not support either Ewing's contract claim or his promissory estoppel claim under governing Michigan law. There was "no sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give Ewing a second chance to take Part I of the NBME examination." 559 F.Supp., at 800. With reference to the pamphlet "On Becoming A Doctor," the District Court held that "even if [Ewing] had learned of the pamphlet's contents before he took the examination, and I find that he did not, I would not conclude that this amounted either to an unqualified promise to him or gave him a contract right to retake the examination." *Ibid.*

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[4] [Footnote omitted].

With regard to Ewing's federal claim, the District Court determined that Ewing had a constitutionally protected property interest in his continued enrollment in the Inteflex program and that a state university's academic decisions concerning the qualifications of a medical student are "subject to substantive due process review" in federal court. *Id.*, at 798. The District Court, however, found no violation of Ewing's due process rights. The trial record, it emphasized, was devoid of any indication that the University's decision was "based on bad faith, ill will or other impermissible ulterior motives"; to the contrary, the "evidence [demonstrated] that the decision to dismiss plaintiff was reached in a fair and impartial manner, and only after careful and deliberate consideration." *Id.*, at 799. To "leave no conjecture" as to his decision, the District Judge expressly found that "the evidence [demonstrated] no arbitrary or capricious action since [the Regents] had good reason to dismiss Ewing from the program." *Id.*, at 800.

Without reaching the state-law breach-of-contract and promissory-estoppel claims,[5] the Court of Appeals reversed the dismissal of Ewing's federal constitutional claim. The Court of Appeals agreed with the District Court that Ewing's implied contract right to continued enrollment free from arbitrary interference qualified as a property interest protected by the Due Process Clause, but it concluded that the University had arbitrarily deprived him of that property in violation of the Fourteenth Amendment because (1) "Ewing was a 'qualified' student, as the University defined that term, at the time he sat for NBME Part I"; (2) "it was the consistent practice of the University of Michigan to allow a qualified medical student who initially failed the NBME Part I an opportunity for a retest"; and (3) "Ewing was the only University of Michigan medical student who initially failed the NBME Part I between 1975 and 1982, and was not allowed an opportunity for a retest." *Ewing v. Board of Regents*, 742 F.2d 913, 916 (CA6 1984). The Court of Appeals therefore directed the University to allow Ewing to retake the NBME Part I, and if he should pass, to reinstate him in the Inteflex program.

We granted the University's petition for certiorari to consider whether the Court of Appeals had misapplied the doctrine of "substantive due process." 470 U.S. 1083 (1985). We now reverse.

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[5] In a footnote, the Court of Appeals stated: "Because we believe this case can be disposed of on the Section 1983 claim, this Court does not expressly reach the breach of contract or promissory estoppel claims." *Ewing v. Board of Regents*, 742 F.2d 913, 914, n. 2 (CA6 1984).

III

In *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91-92 (1978), we assumed, without deciding, that federal courts can review an academic decision of a public educational institution under a substantive due process standard. In this case Ewing contends that such review is appropriate because he had a constitutionally protected property interest in his continued enrollment in the Inteflex program.[7] But remembering Justice Brandeis' admonition not to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (concurring opinion), we again conclude, as we did in Horowitz, that the precise facts disclosed by the record afford the most appropriate basis for decision. We therefore accept the University's invitation to "assume the existence of a constitutionally protectible property right in [Ewing's] continued enrollment,"[8] and hold that even if Ewing's assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action.

As a preliminary matter, it must be noted that any substantive constitutional protection against arbitrary dismissal would not necessarily give Ewing a right to retake the NBME Part I. The constitutionally protected interest alleged by Ewing in his complaint, App. 15, and found by the courts below, derives from Ewing's implied contract right to continued enrollment free from arbitrary dismissal. The District Court did not find that Ewing had any separate right to retake the exam and, what is more, explicitly "[rejected] the contract and promissory estoppel claims, finding no sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give Ewing a second chance to take Part I of the NBME examination." 559 F.Supp., at 800. The Court of Appeals did not overturn the District Court's determination that Ewing lacked a tenable contract or estoppel claim under Michigan law,[9] see *supra*, at 220, and n. 5, and we accept its reasonable rendering of state law, particularly when no party has challenged it.[10]

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[7] Ewing and the courts below reasoned as follows: In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court held that property interests protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law." See Goss v. Lopez, 419 U.S. 565, 572-573 (1975). In a companion case, *Perry v. Sindermann*, 408 U.S. 593, 601-602 (1972), we held that "agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances'" could be independent sources of property interests. See *Bishop v. Wood*, 426 U.S. 341, 344 (1976) (implied contracts). According to an antiquated race discrimination decision of the Michigan Supreme Court (whose principal holding has since been overtaken by events), "when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom." *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 99-100, 120 N. W. 589, 591 (1909). From the foregoing, Ewing would have us conclude that he had a protectible property interest in continued enrollment in the Inteflex program.

[8] Tr. of Oral Arg. 3. Consistent with this suggestion, petitioner's answer to Ewing's complaint "[admitted] that, under Michigan law, [Ewing] may have enjoyed a property right and interest in his continued enrollment in the Inteflex Program." App. 21.

The University's refusal to allow Ewing to retake the NBME Part I is thus not actionable in itself. It is, however, an important element of Ewing's claim that his dismissal was the product of arbitrary state action, for under proper analysis the refusal may constitute evidence of arbitrariness even if it is not the actual legal wrong alleged. The question, then, is whether the record compels the conclusion that the University acted arbitrarily in dropping Ewing from the Inteflex program without permitting a reexamination.

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[9] Although there is some ambiguity in its opinion, we understand the Court of Appeals to have found "clearly erroneous" the District Court's rejection of Ewing's federal substantive due process claim solely because of the "undisputed evidence of a consistent pattern of conduct" -- namely, the "substantial and uncontroverted evidence in the trial record that at the time Ewing took the NBME Part I, medical students were routinely given a second opportunity to pass it." 742 F.2d, at 915. The Court of Appeals found no "rule" to the effect that medical students are entitled to retake failed examinations. Indeed, it relied on the University's "promotional pamphlet entitled 'On Becoming a Doctor'" only to the extent that it "memorialized the consistent practice of the medical school with respect to students who initially fail that examination." *Id.*, at 916 (emphasis added).

A property interest in a second examination, however, cannot be inferred from a consistent practice without some basis in state law. Yet in this case the Court of Appeals did not reverse the District Court's finding that Ewing was not even aware of the contents of the pamphlet and left standing its holding that the statements in this promotional tract did not "[amount] either to an unqualified promise to him or . . .
a contract right to retake the examination" under state law. 559 F.Supp., at 800. We recognize, of course, that "mutually explicit understandings" may operate to create property interests. *Perry v. Sindermann*, 408 U.S., at 601. But such understandings or tacit agreements must support "a legitimate claim of entitlement" under "'an independent source such as state law....'" *Id.*, at 602, n. 7 (quoting *Board of Regents v. Roth*, 408 U.S., at 577). The District Court, it bears emphasis, held that the University's liberal retesting custom gave rise to no state-law entitlement to retake the NBME Part I. We rejected an argument similar to Ewing's in *Board of Regents v. Roth*. In that case Dr. Roth asserted a property interest in continued employment by virtue of the fact that "of four hundred forty-two non-tenured professors, four were not renewed during [a particular] academic year." Brief for Respondent in *Board of Regents v. Roth*, O. T. 1971, No. 71-162, p. 28 (footnote and citation omitted). Absent a state statute or university rule or "anything approaching a 'common law' of reemployment," however, we held that Dr. Roth had no property interest in the renewal of his teaching contract. *Board of Regents v. Roth*, 408 U.S., at 578, n. 16.

[10] "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Propper v. Clark*, 337 U.S. 472, 486-487 (1949). Accord, *Haring v. Prosise*, 462 U.S. 306, 314, n. 8 (1983); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 181, n. 11 (1979); *Butner v. United States*, 440 U.S. 48, 58 (1979); *Bishop v. Wood*, 426 U.S., at 345-347.

It is important to remember that this is not a case in which the procedures used by the University were unfair in any respect; quite the contrary is true. Nor can the Regents be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing; the District Court found that the Regents acted in good faith.

Ewing's claim, therefore, must be that the University misjudged his fitness to remain a student in the Inteflex program. The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment.[11] Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. Cf. *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

Considerations of profound importance counsel restrained judicial review of the substance of academic decisions. As JUSTICE WHITE has explained:

> "Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments. This is...only to underline Mr. Justice Black's constant reminder to his colleagues that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable." *Moore v. East Cleveland*, 431 U.S. 494, 543-544 (1977) (WHITE, J., dissenting).See *id.*, at 502 (opinion of POWELL, J.).

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[11] "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96, n. 6 (1978) (POWELL, J., concurring). See *id.*, at 90-92 (opinion of the Court).

Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).[12] If a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," *Bishop v. Wood*, 426 U.S. 341, 349 (1976), far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions -- decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S., at 89-90.

This narrow avenue for judicial review precludes any conclusion that the decision to dismiss Ewing from the Inteflex program was such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment. Certainly his expulsion cannot be considered aberrant when viewed in isolation. The District Court found as a fact that the Regents "had good reason to dismiss Ewing from the program." 559 F.Supp., at 800. Before failing the NBME Part I, Ewing accumulated an unenviable academic record characterized by low grades, seven incompletes, and several terms during which he was on an irregular or reduced course load. Ewing's failure of his medical boards, in the words of one of his professors, "merely [culminated] a series of deficiencies....In many ways, it's the straw that broke the camel's back." App. 79. Accord, *id.*, at 7, 54-55, 72-73.[13] Moreover, the fact that Ewing was "qualified" in the sense that he was eligible to take the examination the first time does not weaken this conclusion, for after Ewing took the NBME Part I it was entirely reasonable for the faculty to reexamine his entire record in the light of the unfortunate results of that examination. Admittedly, it may well have been unwise to deny Ewing a second chance. Permission to retake the test might have saved the University the expense of this litigation and conceivably might have demonstrated that the members of the Promotion and Review Board misjudged Ewing's fitness for the medical profession. But it nevertheless remains true that his dismissal from the Inteflex program rested on an academic judgment that is not beyond the pale of reasoned academic decisionmaking when viewed against the background of his entire career at the University of Michigan, including his singularly low score on the NBME Part I examination.[14]

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[12] Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see *Keyishian v. Board of Regents*, 385 U.S., at 603; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (opinion of Warren, C. J.), but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself, see *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of POWELL, J.); *Sweezy v. New Hampshire*, 354 U.S., at 263 (Frankfurter, J., concurring in result). Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of "the four essential freedoms" of a university. *University of California Regents v. Bakke*, 438 U.S., at 312 (opinion of POWELL, J.) (quoting *Sweezy v. New Hampshire, supra*, at 263 (Frankfurter, J., concurring in result)) (internal quotations omitted).

[13] Even viewing the case from Ewing's perspective, we cannot say that the explanations and extenuating circumstances he offered were so compelling that their rejection can fairly be described as irrational. For example, the University might well have concluded that Ewing's sensitivity to difficulties in his personal life suggested an inability to handle the stress inherent in a career in medicine. The inordinate amount of time Ewing devoted to his extracurricular essay writing may reasonably have revealed to the University a lack of judgment and an inability to set priorities.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

[Justice Powell, in a concurring opinion, characterized Ewing's interest as a state law contract right, and found no property interest at stake.]

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[14] Nor does the University's termination of Ewing substantially deviate from accepted academic norms when compared with its treatment of other students. To be sure, the University routinely gave others an opportunity to retake the NBME Part I. But despite tables recording that some students with more incompletes or low grades were permitted to retake the examination after failing it the first time, App. 105-111, and charts indicating that these students lacked the outside research and honor grade in clinical work that Ewing received, *id.*, at 119-120, we are not in a position to say that these students were "similarly situated" with Ewing. The Promotion and Review Board presumably considered not only the raw statistical data but also the nature and seriousness of the individual deficiencies and their concentration in particular disciplines -- in Ewing's case, the hard sciences. The Board was able to take into account the numerous incompletes and makeup examinations Ewing required to secure even marginally passing grades, and it could view them in connection with his reduced course loads. Finally, it was uniquely positioned to observe Ewing's judgment, self-discipline, and ability to handle stress, and was thus especially well situated to make the necessarily subjective judgment of Ewing's prospects for success in the medical profession. The insusceptibility of promotion decisions such as this one to rigorous judicial review is borne out by the fact that 19 other Inteflex students, some with records that a judge might find "better" than Ewing's, were dismissed by the faculty without even being allowed to take the NBME Part I a first time. *Id.*, at 165-166. Cf. *id.*, at 66 (nine Inteflex students terminated after suffering one deficiency and failing one course after warning).

Notes and Questions

1. Note the differences between the standard of review the Court applies to institutional decisions regarding student conduct (discipline) and that it applies to institutional decisions regarding student academic performance. What policy interests are served by this distinction?

2. In light of judicial deference to academic judgments, how can academic leaders ensure that such judgments are made fairly and that students' interests are protected?

3. Students can claim the protection of the due process clause only in situations where their "property" or "liberty" interests are at stake. Should students at public institutions be afforded a constitutionally-protected property interest in continued enrollment at their institutions? On what grounds?

4. In his concurrence, Justice Powell stated that courts should not review challenges to academic decisions, particularly in cases where "orderly administrative procedures" were followed. Do you agree with this belief?

5. For a discussion of procedural due process as applied to academic judgments, including a discussion of the *Board of Curators v. Horowitz* case cited in *Ewing*, see *LHE* § 4.8.3.

6. Note the Court's discussion of the pamphlet as a possible source of contractual protection for Ewing. For a discussion of the contractual rights of students, see *LHE* § 4.1.3.

SEC. 4.7.1. Awarding of Grades and Degrees.

Susan M. v. New York Law School
76 N.Y.2d 241; 556 N.E.2d 1104 (1990)

OPINION OF THE COURT BY: ALEXANDER

In this article 78 proceeding, petitioner challenges her dismissal for academic deficiency from respondent law school. Because her allegations are directed at the pedagogical evaluation of her test grades, a determination best left to educators rather than the courts, we conclude that her petition does not state a judicially cognizable claim. Accordingly, we modify the order of the Appellate Division to dismiss the petition in its entirety.

I

Petitioner enrolled at respondent law school in the fall of 1985. In accordance with respondent's published rules, petitioner was automatically placed on academic probation at the end of her first year for having failed to achieve a 2.0, or "C" cumulative average. The law school rules further provided that a student on probation who thereafter fails to achieve both a semester and a cumulative average of 2.0 is subject to academic dismissal at the discretion of the law school's Academic Status Committee (Committee). Such a student, however, has the right to present written and oral statements to the Committee explaining his or her failure to meet the school's academic standards.

Although petitioner earned a cumulative average of 2.001 at the end of her third semester, in her fourth semester her average dropped to 1.546, lowering her cumulative average to 1.89. Consequently she was notified that the Academic Status Committee would be considering whether she would be permitted to continue her studies. She submitted a written statement to the Committee, describing factors that she claimed affected her performance. In this written statement, petitioner blamed her less than "C" average on the grades she received in two of her fourth semester courses, namely, Constitutional Law II, in which she received a "C-", and Corporations, in which she received a "D". She argued that these grades did not fairly and accurately reflect the knowledge she had demonstrated on the exams in those courses. Petitioner also appeared before the Committee to state her case orally. She contends that when she attempted to raise the subject of the two grades, she was immediately interrupted by the Committee chairperson who told her that the Committee would not consider them. Petitioner then gave other reasons for her below average performance. They were unavailing and the Committee voted unanimously to dismiss her for failure to meet the law school's academic standards. Petitioner requested reconsideration of her case, and submitted an additional statement offering still further reasons for her substandard academic performance. The Committee accepted the new submission, but declined to reconsider its decision.

In this article 78 proceeding seeking a judgment directing respondent to reinstate her, petitioner alleges that the Committee's decision to dismiss her was arbitrary and capricious and that her poor performance in her fourth semester was directly attributable to the irrational testing and grading procedures of three of her four professors. She challenged the grades she received in Constitutional Law II, Corporations, and Lawyers and Systems of Justice, alleging that her Constitutional Law exam was unfairly graded and that the professor in Lawyers and Systems of Justice was "a complete incompetent." She also contends, *inter alia*, that the Committee failed to give sufficient weight to a variety of personal factors; and that she was dismissed in retaliation for complaining about her professors.

Petitioner also alleges that when she met with the Corporations professor to discuss her grade, the professor told her that she was given zero credit on an essay question worth 30% of the exam because she analyzed the problem under both Delaware law and New York law when only Delaware law was called for, that her answer did correctly analyze the problem under Delaware law and that she would have received full credit on this question had she only refrained from mentioning New York law. Notwithstanding petitioner's claim that she only mentioned New York law to get extra credit, the professor allegedly insisted that petitioner gave two answers to the question, thereby indicating that she did not know which one was correct, and was therefore not entitled to any credit. Petitioner also alleges that the professor advised her that points were deducted from the Corporations exam because she had misused the term "oppressive conduct" and because the exam was written in the style of a first-year student.

The responding affidavits of respondent's Dean of Academic Affairs and the Corporations professor asserted that the grading of the exam was purely a matter of academic discretion and that the exam grade was based upon the over-all quality of petitioner's answer and not on any narrow, formalistic concerns.

Supreme Court dismissed the petition, concluding that petitioner had not demonstrated that her dismissal was arbitrary, capricious or ordered in bad faith. The Appellate Division rejected most of petitioner's claims, but reversed Supreme Court and granted the petition to the extent of remanding the matter to respondent for further consideration of the Corporations grade to determine whether the grade given on the exam, including the disputed essay, was a rational exercise of discretion.

Respondent appeals and petitioner cross-appeals by leave of that court, which also certified the question of whether its order was properly made.

II

On this appeal, respondent argues that the Appellate Division erred in concluding that petitioner's allegations as to her Corporations grade state a judicially cognizable claim. We agree.

Strong policy considerations militate against the intervention of courts in controversies relating to an educational institution's judgment of a student's academic performance (*Matter of Olsson v Board of Higher Educ.*, 49 NY2d 408, 413; *Tedeschi v Wagner Coll.*, 49 NY2d 652, 658; *Matter of Sofair v State Univ. of N. Y. Upstate Med. Center Coll. of Medicine*, 54 AD 2d 287, revd on other grounds 44 NY2d 475; see also, *Board of Curators, Univ. of Mo. v Horowitz*, 435 U.S. 78, 89-90). Unlike disciplinary actions taken against a student (*Tedeschi v Wagner Coll., supra*), institutional assessments of a student's academic performance, whether in the form of particular grades received or actions taken because a student has been judged to be scholastically deficient, necessarily involve academic determinations requiring the special expertise of educators (*Board of Curators v Horowitz*, 435 U.S., at 90, *supra*). These determinations play a legitimate and important role in the academic setting since it is by determining that a student's academic performance satisfies the standards set by the institution, and ultimately, by conferring a diploma upon a student who satisfies the institution's course of study, that the institution, in effect, certifies to society that the student possesses the knowledge and skills required by the chosen discipline (*Matter of Olsson v Board of Higher Educ., 49 NY2d, at 413, supra; see also, Matter of Pace Coll. v Commission on Human Rights*, 38 NY2d 28, 38; *Matter of Patti Ann H. v New York Med. Coll.*, 88 AD2d 296, 301, affd 58 NY2d 734). Thus, to preserve the integrity of the credentials conferred by educational institutions, the courts have long been reluctant to intervene in controversies involving purely academic determinations (*Matter of Olsson v Board of Higher Educ.*, 49 NY2d, at 413, *supra*).

Accordingly, although we have emphasized that the determinations of educational institutions as to the academic performance of their students are not completely beyond the scope of judicial review (*id.*, at 413-414; *Morales v New York Univ.*, 83 AD2d 811, affd for reasons stated below 55 NY2d 822), that review is limited to the question of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith or contrary to Constitution or statute (*id.; James v Board of Educ.*, 42 NY2d 357, 365). This standard has rarely been satisfied in the context of challenges to academic determinations because the courts have repeatedly refused to become involved in the pedagogical evaluation of academic performance. Thus, we have declined, in the absence of bad faith, to compel a university to award a diploma where a student alleged that he had failed a final comprehensive exam because of his reliance on the professor's misstatement as to how the exam would be graded (*Matter of Olsson v Board of Higher Educ., supra*), or to compel a medical school to permit a student who had failed a number of courses to repeat a year (*Matter of Patti Ann H. v New York Med. Coll.*, 88 AD2d 296, affd 58 NY2d 734, *supra*), and we have concluded that a college did not act arbitrarily in refusing to "round off" a senior's grade so that she might graduate (Matter of McIntosh v Borough of Manhattan Community Coll., 55 NY2d 913, affg 78 AD2d 839; see also, *Matter of Sofair v State Univ. of N. Y. Upstate Med. Center Coll. of Medicine*, 54 AD2d 287, *supra; Matter of Spencer v New York City Bd. of Higher Educ.*, 131 Misc 2d 847; *Morpurgo v United States*, 437 F Supp 1135; *Connelly v University of Vt.*, 244 F Supp 156 [citing cases]).

As a general rule, judicial review of grading disputes would inappropriately involve the courts in the very core of academic and educational decision making. Moreover, to so involve the courts in assessing the propriety of particular grades would promote litigation by countless unsuccessful students and thus undermine the credibility of the academic determinations of educational institutions. We conclude, therefore, that, in the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a student's challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student's academic capabilities, is beyond the scope of judicial review (see, *Regents of Univ. of Mich. v Ewing*, 474 U.S. 214, 225; *Morpurgo v United States*, 437 F Supp 1135, *supra; Connelly v University of Vt.*, 244 F Supp 156, *supra*).

Petitioner's allegations do not meet this standard; rather, they go to the heart of the professor's substantive evaluation of the petitioner's academic performance and as such, are beyond judicial review. The claim that this Corporations grade resulted in petitioner's arbitrary dismissal from the law school was properly dismissed by Supreme Court. We have considered the contentions raised on petitioner's cross appeal and conclude that they are without merit.

Accordingly, the order of the Appellate Division should be modified to dismiss the petition in its entirety, and, as so modified, affirmed, with costs. The certified question should not be answered as unnecessary.

Order modified, with costs to appellant-respondent, by dismissing the petition and, as so modified, affirmed. Certified question not answered as unnecessary.

Notes and Questions

1. The N.Y. Court of Appeals' decision and the prior proceedings in the lower courts are discussed in *LHE* at pp. 473-474.

2. Describe the internal appeals procedures afforded Susan M. Did they comport with the requirements of constitutional due process? Was the institution obligated to comply with such requirements?

3. Note the court's deference to academic judgments and its firm belief that judicial review of such judgments is inappropriate. Do there appear to be any circumstances in which this court would find that review of academic judgments is appropriate?

4. Assume that Susan M is correct--that one professor graded her essay unfairly and that the second professor was "incompetent." What remedy should Susan M receive? Regrading of her exams by a different professor? Retaking another version of the exam? Retaking the course? Consider the academic freedom issues for the faculty members that may be implicit in each of these potential remedies. See the discussion of academic freedom in teaching, *LHE* § 3.7.2.

SEC. 4.7.2. Degree Revocation.

Crook v. Baker
813 F.2d 88 (6th Cir. 1987)

This case is set out in *LHE* pp. 475-476.

Notes and Questions

1. If the institution in this case had been private rather than public, would a pre-revocation hearing have been necessary? If not, would you have recommended that such a hearing be held?

2. How should hearing panels be constituted so as to provide a fair hearing to the student? Upon what evidence should the decision be made? Can you improve upon the procedures utilized by the university in *Crook v. Baker?*

3. The appellate court opinion in this case also relies on the Ohio Supreme Court's opinion in the *Waliga* litigation that is referred to in LHE, sec. 4.7.2., p. 475. Taken together, the appellate court opinions in *Crook v. Baker* and *Waliga v. Board of Trustees* create the first substantial body of American law on the revocation of academic degrees. See generally B. Reams, "Revocation of Academic Degrees by Colleges and Universities," 14 *J. Coll. and Univ. L.* 285 (1987).

SECS. 4.5.2., 4.6.1., 4.8.2.; see also SECS. 4.12.1. & 5.7.
Codes of Student Conduct, Public Institutions, and
Public Institutions: Disciplinary Sanctions;
Institutional Recognition and Regulation of Fraternal Organizations and
Community Activities of Faculty Members and Students.

Problem 8

A few months ago, the local flagship campus of the state university promulgated an Off-Campus Misconduct Policy. This policy authorizes disciplinary sanctions against students who participate in "misconduct" that does not take place on the campus or other university property IF "(a) the misconduct takes places at an event sponsored or sanctioned by the university or one of its schools or academic departments; or (b) the misconduct is detrimental to the interests of the university." "Misconduct" is defined to include most of the same types of actions that are covered by the Campus Student Code covering on-campus misconduct. A notice was sent to all students informing them of the university's new policy.

Last Saturday evening, the university's largest fraternity held its annual "Drink 'til you Drop" party. The fraternity's house is located in a residential neighborhood just outside the university's campus. Students arrived by the dozens to celebrate.

There was enough beer to last through the night, and the D.J. cranked the music up so high that the walls began to vibrate. By midnight the house was packed, and students began to gather outside. Some sat around the firepit behind the house and sang the well-known university drinking song; others chased one another up and down the street, carelessly tossing their empty beer cups and half-eaten hot dogs on the neighbors' lawns.

On Monday morning, the university received many complaints from the residents of the neighborhood. Two of the students had mistakenly barged into a neighbor's house looking for the fraternity party . Several students urinated on the lawns of other neighbors. One woman claimed that a brick thrown by one of the party-goers shattered her dining room window. A man claimed that students drove a car across his lawn and left deep ruts. Other residents protested that they received little or no sleep as a result of the noise and thumping of the music that blared throughout the night.

University student affairs staffers have identified the officers of the fraternity that sponsored the party, the student that threw the brick, one of the urinating students, and a number of other students who attended the party late into the night. The university plans to invoke its Off-Campus

Misconduct Policy against all of these students, and has advised each student of its intentions. The students claim they will challenge the legality of the policy and its application to them. Is the policy valid? Can it validly be applied to each of the identified students? What changes in the wording of the policy, or its particular applications, would be advisable?

SEC. 4.8.4. Private Institutions.

Napolitano v. Trustees of Princeton University

86 N.J. Super. 548; 453 A.2d 263 (App. Div. 1982)

The opinion of the court was delivered by Matthews, P.J.A.D.

When this action was instituted plaintiff was a student in her senior year at Princeton University, a member of the Class of 1982. Were it not for the disciplinary action which precipitated this litigation, she would have been eligible to graduate on June 8, 1982. She is presently eligible to graduate in June 1983, at which time she will receive a Bachelor of Arts degree, with a major in English.

Defendant, The Trustees of Princeton University, is an educational corporation in the State of New Jersey. It operates a private institution of higher education known as Princeton University. Princeton offers undergraduate programs leading to the degrees of Bachelor of Arts and Bachelor of Science in Engineering.

[Defendant William G. Bowen is the President of Princeton University. Defendant Peter Onek is an Assistant Dean of Student Affairs at Princeton, one of whose responsibilities is chairing the Faculty-Student Committee on Discipline (COD). Defendant Sylvia Molloy is a Professor of Spanish in the Department of Romance Languages and Literatures.]

* * * *

During the Fall Term of the 1981-1982 academic year Professor Molloy taught Spanish 341, a course entitled "The Spanish American Novel." Plaintiff elected to become a student in that course. It was her submission of a term paper for that course which gave rise to the disciplinary proceedings here under review.

Princeton maintains a bifurcated disciplinary system with nonconcurrent jurisdiction in two committees for the purpose of disciplining undergraduate students: the Princeton Honor Committee, which is concerned with examinations given under Princeton's Honor System, and the Faculty-Student Committee on Discipline (COD).

All disciplinary matters concerning undergraduates which do not involve in-class examinations are subject to the jurisdiction of the COD. This includes academic violations, such as plagiarism on essays, term papers or laboratory reports, and nonacademic violations, such as disorderly conduct or drug-related offenses. The COD is a Standing Committee of the Faculty of Princeton University. Rules and Procedures of the Faculty of Princeton University (July 1978 with Addenda).

A general description of some of the rules and procedures of the COD is found in a booklet entitled *Rights, Rules, Responsibilities* -- 1980 Edition (*RRR-1980*). The penalty section lists the following penalties:

> Range of Penalties. For violation of University-wide rules of conduct, members of the community are subject to several kinds of penalties. The applicability and exact nature of each penalty varies for faculty, students, professional staff, and employees; but in general the penalties, in ascending order of severity, are:
>
> 1. Warning . . .
>
> 2. Disciplinary Probation. A more serious admonition assigned for a definite amount of time, up to two years. It implies that any future violation, of whatever kind, during that time, may be grounds for suspension, required withdrawal, or in especially serious cases, for expulsion, from the University.
>
> 3. Suspension. Removal from membership in, or employment by, the University for a specified period of time.
>
> 4. Required Withdrawal. Removal from membership in, or employment by, the University for at least the period of time specified by suspension, with the suspension to continue until certain conditions, stipulated by the appropriate body applying this sanction, have been fulfilled. These conditions may include restitution of damages or formal apology.
>
> 5. Expulsion . . .
>
> 6. Censure . . .

A withheld degree, the penalty imposed upon plaintiff, is a less severe variation of suspension. It is imposed only upon second semester seniors. It permits them to finish their academic requirements and wait the prescribed period to receive their degree, rather than requiring them to lose their tuition and repeat their last semester in the following academic year. Excluding plaintiff's case, Princeton has withheld 20 degrees for disciplinary reasons since the 1972-1973 academic year.

There are two avenues of appeal from the decision and penalty of the COD: to the Judicial Committee of the Council of the Princeton University Community (Judicial Committee) and to the President of the University. Only the Judicial Committee avenue of appeal appears in the written material. A direct appeal to President Bowen from the COD is not mentioned in *RRR-1980* or any other University publication, but, we are advised, is the avenue chosen in the overwhelming number of cases in which there is an appeal.

The appellate jurisdiction exercised by the President of the University is generally confined to a review of the penalty. It is accurately described in the *RRR* section concerning appeals from the Judicial Committee.

RRR contains a lengthy section concerning the "general requirements" or "fundamental principles" for the acknowledgment of sources in academic work:

> General Requirements for the Acknowledgment of Sources in Academic Work. The academic departments of the University have varying requirements for the acknowledgment of sources, but certain fundamental principles apply to all levels of work. In order to prevent any misunderstanding, students are expected to study and comply with the following basic requirements.
>
> Quotations. Any quotations, however small, must be placed in quotation marks or clearly indented beyond the regular margin. Any quotation must be accompanied (either within the text or in a footnote) by a precise indication of the source -- identifying the author, title, place and date of publication (where relevant), and page numbers. Any sentence or phrase which is not the original work of the student must be acknowledged.
>
> Paraphrasing. Any material which is paraphrased or summarized must also be specifically acknowledged in a footnote or in the text. A thorough rewording or rearrangement of an author's text does not relieve one of this responsibility. Occasionally, students maintain that they have read a source long before they wrote

their papers and have unwittingly duplicated some of its phrases or ideas. This is not a valid excuse. The student is responsible for taking adequate notes so that debts of phrasing may be acknowledged where they are due.

Ideas and Facts. Any ideas or facts which are borrowed should be specifically acknowledged in a footnote or in the text, even if the idea or fact has been further elaborated by the student. Some ideas, facts, formulae, and other kinds of information which are widely known and considered to be in the "public domain" of common knowledge do not always require citation. The criteria for common knowledge vary among disciplines; students in doubt should consult a member of the faculty.

Occasionally, a student in preparing an essay has consulted an essay or body of notes on a similar subject by another student. If the student has done so, he or she must state the fact and indicate clearly the nature and extent of his or her obligation. The name and class of the author of an essay or notes which are consulted should be given, and the student should be prepared to show the work consulted to the instructor, if requested to do so.

Footnotes and Bibliography. All the sources which have been consulted in the preparation of an essay or report should be listed in a bibliography, unless specific guidelines (from the academic department or instructor) request that only works cited be so included. However, the mere listing of a source in a bibliography shall not be considered a "proper acknowledgement" for specific use of that source within the essay or report.

. . . .

This description of "fundamental principles" is followed by a series of definitions of "academic fraud" within the jurisdiction of the COD:

With regard to essays, laboratory reports, or any other written work submitted to fulfill an official academic requirement, the following are considered academic fraud:

> Plagiarism. The deliberate use of any outside source without proper acknowledgment. "Outside source" means any work, published or unpublished, by any person other than the student.
>
> . . .

Please note that, while not all academic infractions involve fraud, all are violations of the University's standards and will normally result in disciplinary penalties.

Because of the importance of original work in the Princeton academic community, each student is required to attest to the originality of the submitted work and its compliance with University regulations:

> Student Acknowledgment of Original Work
>
> At the end of an essay, laboratory report, or any other requirement, the student is to write the following sentence and sign his or her name: "This paper represents my own work in accordance with University regulations." [Emphasis in original]

RRR also presents a brief but fairly complete discussion of violations and examples of violations of these regulations.

At the first class meeting of Spanish 341, Professor Molloy announced that the course requirements would be a term paper and midterm and final examinations. The term paper was to be a critical analysis of one of the works read for the course, on a topic which was to be chosen by the student but approved by Professor Molloy. The paper could be handed in at any time during the Fall Term, but no later than January 13, 1982, the last day of Princeton's reading period.

Plaintiff did not meet with Professor Molloy to seek approval of her topic until December 16, 1981, the last day of classes before the Christmas recess. She was one of the last, if not the last, to seek such approval from Professor Molloy.

Plaintiff told Professor Molloy that she wanted to write her paper on the family ties in a novel entitled *Cien anos de soledad* (100 Years of Solitude) by Gabriel Garcia Marquez. Professor Molloy approved the topic and told plaintiff that she ought to read *Cien anos de soledad: una interpretacion* by Josefina Ludmer (Ludmer), a book which Professor Molloy had put on library reserve at the beginning of the Fall Semester. At her deposition, Professor Molloy described Ludmer's work as "a very highly personal and highly original work" and "revolutionary" in that it "allowed people to perceive [100 years] in a completely different light." Professor Molloy told plaintiff to read or be aware of Ludmer, which treated "important aspects of the topic" plaintiff had chosen.

Plaintiff has testified that Ludmer was the only book to which she referred in writing her paper. Although she also testified that she did not have Ludmer in front of her when she wrote her paper, she admitted that she did refer to her notes, all of which had been prepared while she was reading Ludmer.

Plaintiff's paper was entitled "Un analisis de la estructura de Cien anos de soledad." It consisted of 12 typewritten pages, plus a title page and a page of footnotes. The paper was written in Spanish.

A simple comparison of plaintiff's paper and Ludmer reveals numerous sections of the paper which are taken verbatim, or in other portions virtually verbatim, from Ludmer, but which are not put into quotation marks or indented and which are not footnoted. At the end of her paper plaintiff wrote and signed the acknowledgment of originality required by *RRR*, in Spanish: "This paper represents my own work in accordance with University regulations."

On or about January 21, 1982 Professor Molloy began to correct plaintiff's paper. As soon as she began reading the first page she "sensed there was something wrong" and wrote, "Is this yours?", in Spanish, on the margin. She did not go beyond the first page, which contains no footnote or reference to Ludmer, before she "realized that Gabrielle Napolitano had not written what [she] was reading."

On January 22, 1982, after completing her review of plaintiff's paper and Ludmer, Professor Molloy consulted *RRR-1980* and the Faculty Rules. Pursuant to the instruction at page 80 of the Faculty Rules, Professor Molloy telephoned Dean Onek and told him about plaintiff's paper. Dean Onek told her to send him a letter, with the paper and Ludmer, to present the copied material as clearly as possible and to turn in an "Incomplete" as plaintiff's grade in the course.

On January 26, 1982 Professor Molloy sent the letter Dean Onek had requested, setting forth her charge of plagiarism against plaintiff.

Between his receipt of Professor Molloy's letter and the date of the first COD hearing, Dean Onek met with plaintiff on four separate occasions. In the course of those meetings Dean Onek explained the various written and unwritten rules and procedures of the COD. He gave plaintiff copies of her paper, Ludmer and Professor Molloy's letter. He also sent plaintiff a formal letter notifying her of the hearing. At plaintiff's request Dean Onek spoke by telephone to her parents' attorney during one of their meetings.

The first COD hearing took place on Thursday, February 11. Plaintiff arrived at about 8 a.m. While she and her advisor waited in Dean Onek's office, the Dean distributed copies of Professor Molloy's letter, plaintiff's paper and the photocopy of Ludmer to members of the COD for their review. Contrary to plaintiff's claim otherwise, Professor Molloy did not meet with the Committee during that 20-minute period. She was waiting in another office while plaintiff and her advisor were in Dean Onek's office. Professor Molloy entered the hearing room about one minute prior to plaintiff.

As Secretary of the COD, Dean Onek took notes at the hearing, which were transformed into the minutes sent to President Bowen. The minutes describe the hearing in some detail, but we do not have need to refer to them because the results of this hearing were mooted by the remand and rehearing ordered by the trial judge.

After the COD unanimously voted to find plaintiff guilty of plagiarism and withhold her degree for one year, Dean Onek informed her of the decision and subsequently met with her to explain the right of appeal.

Plaintiff met with President Bowen's assistant to discuss the appeal sometime before February 18, 1982, the date on which she wrote a letter to President Bowen, appealing to him for "clemency."

Plaintiff met with President Bowen and his assistant on Friday, February 26, 1982. President Bowen and plaintiff discussed her appeal. Although plaintiff claims that President Bowen stated that her conduct was an "unconscious act," there is no independent support of that found in the record.

President Bowen reviewed the file materials regarding proceedings before the COD and also received a letter on plaintiff's behalf from Professor Aarsleff. On March 1, 1982 President Bowen wrote to plaintiff to inform her that he had decided to uphold the determination of the COD.

A verified complaint was filed on April 22, 1982, at which time the trial judge entered an order to show cause scheduling a hearing on plaintiff's request for injunctive relief. Plaintiff's 14-count, verified complaint stated a wide variety of legal theories, all of which were directed to an attack upon the finding of plagiarism at Princeton University and the resulting penalty.

The first, second and third counts alleged causes of action arising under N.J.Const. (1947), Art. I, par. I. The fourth and fifth counts sounded in contract, alleging that defendants' actions violated the terms of plaintiff's contract with Princeton University. The sixth count alleged a cause of action under the law of associations, claiming that defendants deviated from Princeton's own rules and regulations.

The seventh count alleged a cause of action under the Fifth and Fourteenth Amendments to the United States Constitution. The eighth count alleged a cause of action under 42 U.S.C.A. § 1983.

The ninth and eleventh counts alleged causes of action sounding in defamation. The tenth count alleged a cause of action for intentional infliction of emotional harm. The twelfth count alleged a cause of action for invasion of privacy. The thirteenth count alleged a cause of action for malicious interference with plaintiff's prospective economic advantage, and the fourteenth count alleged a cause of action for malicious interference with plaintiff's contractual relationship.

Under all counts plaintiff sought actual and punitive damages, plus costs and attorneys' fees. Under the first through eighth counts plaintiff sought temporary and permanent injunctive relief, primarily (1) to require defendants to graduate her on June 8, 1982; (2) to restrain defendants from notifying any of the law schools to which she has applied of the disciplinary action taken against her, and (3) to require defendants to clear her record.

Defendants filed an answer denying the material allegations of the complaint and set forth separate defenses.

On April 22, 1982, at plaintiff's request, the trial judge entered an order permitting discovery with leave of court, which required defendants to produce documents and appear for depositions commencing Tuesday, April 27, 1982.

Plaintiff deposed defendant Sylvia Molloy (Professor Molloy), defendant Peter Onek (Dean Onek) (three sessions), defendant William G. Bowen (President Bowen) and Princeton University Athletic Director Robert Myslik. Defendants deposed plaintiff, Helene S. Napolitano (plaintiff's mother), Professor Hans Aarsleff and former Princeton coach Leonard Rivers.

After several procedural motions, including a motion by defendants to disqualify the trial judge (which he denied), and various conferences among counsel and the judge, the parties were directed to bring cross-motions for summary judgment on the following issues: (1) whether the New Jersey Constitution imposes due process requirements on Princeton's disciplinary system; (2) whether the Faculty-Student Committee on Discipline applied the appropriate standard in finding plaintiff guilty of plagiarism; (3) whether there is a right to counsel in connection with disciplinary proceedings at a private university; (4) whether Princeton denied plaintiff a right to have certain witnesses speak on her behalf; (5) whether plaintiff was given adequate notice of her right to question Professor Molloy; (6) whether plaintiff violated Princeton's rules on plagiarism and (7) whether the penalty imposed on plaintiff breached an express or implied term of the "contract" between plaintiff and Princeton or her associational rights as a student at Princeton.

The first summary hearing was held on May 24, 1982. At that hearing both sides chose to present oral argument and to rely upon the written materials previously submitted to the court, including affidavits, depositions and numerous exhibits. Although the trial judge had clearly stated, on numerous prior occasions, that testimony could be presented, neither party chose to call any witnesses.

After hearing oral argument the trial judge decided to remand the matter for a rehearing at Princeton. He found that a conviction for the academic fraud offense of plagiarism must be based upon a finding of "intent to pass off the submitted work as the student's own." He also required that plaintiff be permitted to call "any witnesses she wished on her own behalf, subject only to reasonable regulation by the presiding officer." He rejected plaintiff's argument that she was entitled to be represented by counsel at the rehearing. He retained jurisdiction and scheduled a further hearing for June 2, 1982, 186 N.J. Super. 548.

The trial judge also directed counsel to prepare a set of instructions to the Faculty-Student Committee on Discipline, setting forth its responsibilities at the hearing. That document was prepared with the agreement of both counsel and presented to COD. The instructions provided, among other things: (1) the Committee was to proceed in its usual manner, except as specifically set forth in the "charge"; (2) the Committee was free to reach the same or a different result; (3) plaintiff could call any witness, subject to "reasonable limitation in terms of numbers, length of presentation, and the like"; (4) the Committee was "not limited in any way to information presented at the earlier hearing"; (5) the decision was to "be based solely on the information presented at the rehearing"; (6) the entire proceedings, including deliberations, were to be tape-recorded and (7) the minutes or "summary" of the proceedings were to be prepared by the acting secretary and approved by each member of the Committee.

With respect to the COD's responsibilities in rehearing the accusation against plaintiff, the instructions provided, in full:

> The Committee should first focus upon whether the offense of plagiarism has occurred. In so doing, it should determine whether there has been deliberate use of an outside source without proper acknowledgment. In this regard, "deliberate" means "intention to pass off the work as one's own." If the question of a penalty is reached, the Committee should then focus upon: (a) the seriousness of the offense that has been found to have been committed, (b) the character and accomplishments of the person who has committed the offense, (c) the penalties assigned in other cases, and (d) the purposes -- including educative -- of the penalty to be assigned in this matter.

At plaintiff's request, the trial judge directed that the documents which were submitted to him be made available to the Committee prior to the rehearing. They included: (1) plaintiff's three-volume appendix; (2) the complete transcripts of all depositions and (3) unannotated copies of the English translations of plaintiff's paper and the Ludmer text which had been Appendix B to defendants' brief.

The rehearing took place on May 27, 1982, commencing at 8 a.m. Plaintiff was accompanied into the hearing room by her chosen advisor, Professor Jameson W. Doig, who spoke on her behalf. The COD agreed to hear from plaintiff's five character witnesses, plus Professor Aarsleff but, as permitted by the court below and the instructions, it limited each witness's presentation to five minutes. This limitation, however, was not strictly followed.

After hearing the opening and closing remark of Professor Doig, plaintiff's statement and the questioning of Professor Molloy, plaintiff and other witnesses, the COD excused plaintiff, her advisor and all of the witnesses in order to deliberate. The Committee unanimously found plaintiff guilty of plagiarism (8-0) and, with one abstention, imposed the penalty of withholding her degree for one year (7-1).

Dean Paulo Cucchi, who had replaced Dean Onek as the Secretary of the Committee for the purposes of the rehearing, prepared the summary of the hearing required by the instructions.

On May 30, 1982 plaintiff and Professor Doig met with President Bowen to discuss her appeal. Plaintiff's parents also met with President Bowen on that date. On June 1, 1982 President Bowen affirmed the decision reached by the COD at the rehearing.

The trial judge held a final summary hearing on June 2, 1982. After hearing the argument of counsel, he found that the decision on the remand was supported by the evidence. He stated that the "Committee's findings concerning intent are explicit and substantiated in the record as set forth in some detail on pages two and three of the summary of the hearing dated May 28, 1982"; that "there is no question from plaintiff's extensive use of unattributed material, that the committee was justified in concluding that she committed the offense with the intention to pass off the quoted material as her own." While he emphasized his personal disagreement with the severity of the penalty, he held that he could not find "that Princeton could not in good faith have assessed the penalties it did against plaintiff."

With this fairly detailed statement of the facts and proceedings before the University and the trial judge as a background, we proceed to a determination of the legal issues raised by plaintiff on this appeal.

The principal issue, as we see it, is whether the trial judge properly viewed his role as limited to a determination of whether Princeton substantially complied with its own regulations in disciplining plaintiff and, if so, whether Princeton's decision was supported by the evidence adduced at the hearing, and whether the penalty imposed was within Princeton's authority to impose.

Plaintiff first argues that the trial judge committed reversible error by failing to provide her with a testimonial hearing and by granting defendants' motion for summary judgment and dismissal of the complaint "notwithstanding that material facts remain hotly in dispute." In her second argument, which is intertwined with the first, she claims that the trial judge's deference to defendants' fact-finding and conclusions of law severely prejudiced her and constitutes reversible error.

Before discussing the merits of these controversies, we deem it important to clear the record of some confusion which we observe with respect to the offense with which plaintiff was charged. Plaintiff seems to contend that she has been disciplined for misconduct in the University and that the penalty imposed was the result of this misconduct. We believe that the infraction for which plaintiff was penalized constituted an academic offense under University regulations and therefore must be considered in the light of an academic disciplinary action on the part of the University authorities. It is clear that plaintiff was charged with plagiarism -- in other words, that plaintiff attempted to pass off as her own work, the work of another. That act, if proven, constituted academic fraud. We do not view this case as involving an appeal from a finding of general misconduct; instead, we are concerned with the application of academic standards by the authorities at Princeton.

In pursuing the arguments mentioned above plaintiff points to "several crucial matters [which] remained hotly disputed." Did she commit plagiarism? Was the penalty fair and/or consistent with penalties imposed by defendants in "similar" cases (and thereby within the parties' contract)? And, did the penalty serve an educative purpose and thereby come within the scope of the parties' bargain?

Plaintiff complains that the trial judge gave total deference to the results of the second hearing at the University and thereby abdicated his role as a Chancery Division judge. Contrary to plaintiff's contentions, the trial judge did not determine his role in reviewing the proceedings before the University and the penalty without recourse to authority. In the opinion he filed after the proceedings there may be found citation to several cases dealing with academic discipline and the role that courts should play in dealing with the rights of students vis-a-vis the university in which they are enrolled. Because of the lack of precedent in this jurisdiction, he referred to our law of private associations, as set forth in *Higgins v. American Society of Clinical Pathologists*, 51 N.J. 191 (1968). He also noted the comprehensive opinion filed by Judge Ackerman in the United States District Court in *Clayton v. Princeton University*, 519 F.Supp. 802 (D.N.J.1981).

In *Higgins v. American Society of Clinical Pathologists*, Justice Proctor, speaking for the court, described the relationship between a private organization and one of its members, and the rights of each, in the following terms:

> While the general rule is that courts will not compel admission of an individual into a voluntary association, they have been willing to intervene and compel the reinstatement of a member who has been wrongfully expelled: "The law accords important rights and status to members of voluntary organizations not extended to

> mere aspirants to membership therein...."
>
> The rights accorded to members of an association traditionally have been analyzed either in terms of property interests -- that is, some interest in the assets of the organization,...or in terms of contract rights -- that is, reciprocal rights and duties laid down in the constitution and bylaws....These theories, however, are incomplete since they often prevent the courts from considering the genuine reasons for and against relief . . . and have been extensively criticized. See, e.g., "Note, Judicial Control of Actions of Private Associations," 76 *Harv.L.Rev*. 983, pp. 998-1002 (1963); "Note," 15 *Rutgers L.Rev*. 327, pp. 330-333 (1960). Leading commentators have pointed out that the real reason for judicial relief against wrongful expulsion is the protection of the member's valuable personal relationship to the association and the status conferred by that relationship....As Professor Chafee has noted, "the wrong is a tort, not a breach of contract, and the tort consists in the destruction of the relation rather than in a deprivation of the remote and conjectural right to receive property."...The loss of status resulting from the destruction of one's relationship to a professional organization ofttimes may be more harmful than a loss of property or contractual rights and properly may be the subject of judicial protection....
>
> * * * *
>
> ...In determining whether the deprivation of plaintiff's status was justified, our examination of the reason for her expulsion must be limited. Courts ordinarily ought not to intrude upon areas of associational decision involving specialized knowledge. . . . Private associations must have considerable latitude in rule-making in order to accomplish their objectives and their private law generally is binding on those who wish to remain members. However, courts will relieve against any expulsion based on rules which are in conflict with public policy....[51 N.J. at 199-202; citations omitted.]

We do not believe, however, that the law of private associations delineates completely the relationship between a student and a university. The relationship is unique. The status of a private university such as Princeton was referred to by Justice Handler in his opinion for the court in *State v. Schmid*, 84 N.J. 535 (1980), in these terms:

> A private educational institution such as Princeton University involves essentially voluntary relationships between and among the institution and its students, faculty, employees, and other affiliated personnel, and the life and activities of the individual members of this community are directed and shaped by their shared educational goals and the institution's educational policies. [at 552]

The student comes to the academic community (the university) seeking to be educated in a given discipline. The student pays a tuition which might, in some instances, represent a contractual consideration. The university undertakes to educate that student through its faculty and through the association of other students with that student and the faculty. Transcending that bare relationship is the understanding that the student will abide by the reasonable regulations, both academic and disciplinary, that the student will meet the academic standards established by the faculty and that the university, on the successful completion of studies, will award the degree sought to the student. Such a relationship, we submit, cannot be described either in pure contractual or associational terms. In those instances where courts have dealt with the relationship of a private university to its students in contractual terms, they have warned against a rigid application of the law of contracts to students' disciplinary proceedings. Thus, in *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10 Cir.1975), it was held:

> It is apparent that some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that "contract law" must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted. There are other areas of the law which are also used by courts and writers to provide elements of such a framework. These included in times past parens patriae, and now include private associations such as church membership, union membership, professional societies; elements drawn from "status" theory, and others. Many sources have been used in this process, and combinations thereof, and in none is it assumed or required that all the elements of a particular doctrine be applied. The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category. It may also be different at different schools. There has been much published by legal writers advocating the adoption of various categories to be applied to the relationship. See 72 *Yale L.J.* 1387; 48 *Indiana L.J.* 253; 26

> *Stanford L.Rev.* 95; 38 *Notre Dame Lawyer* 174. There are also many cases which refer to a contractual relationship existing between the student and the university, especially private schools. See *Carr v. St. John's University*, 17 A.D.2d 632, 231 N.Y.S.2d 410; *University of Miami v. Militana*, 184 So.2d 701 (Fla.App.); *Zumbrun v. University of Southern California*, 25 Cal.App.3d 1, 101 Cal.Rptr. 499; *Drucker v. New York University*, 59 Misc.2d 789, 300 N.Y.S.2d 749. But again, these cases do not adopt all commercial contract law by their use of certain elements. [at 626]

* * * *

In *State v. Schmid*, 84 N.J. at 543, a case involving Princeton University, although in a different milieu, it was noted:

* * * *

> ... [W]e must give substantial deference to the importance of institutional integrity and independence. Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well being of their communities of students, teachers and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in controlling those who seek to enter its domain. The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions. ...Hence, private colleges and universities must be accorded a generous measure of autonomy and self governance if they are to fulfill their paramount role as vehicles of education and enlightenment.... [at 566-567; citations and footnote omitted]

Courts have also recognized the necessity for independence of a university in dealing with the academic failures, transgressions or problems of a student. We have noted heretofore that we regard the problem before the court as one involving academic standards and not a case of violation of rules of conduct. Plaintiff, apparently ignoring the distinction, seeks a full panoply of procedural safeguards under a claim of due process.

Courts have been virtually unanimous in rejecting students' claims for due process in the constitutional sense where academic suspensions or dismissal are involved. See *Slaughter v. Brigham Young Univ.*, 514 F.2d at 625; *Jansen v. Emory Univ.*, 440 F.Supp. at 1062; *Lyons v. Salve Regina College*, 565 F.2d at 202-203; *Mahavongsanan v. Hall*, 529 F.2d 448, 449-450 (5 Cir.1976); *Kwiatkowski v. Ithaca College*, 82 Misc.2d 43, 368 N.Y.S.2d 973, 976-977 (Sup.Ct.1975); *Tedeschi v. Wagner College*, 49 N.Y.2d 652, 427 N.Y.S.2d 760, 404 N.E.2d 1302, 1304 (Ct.App.1980).

* * * *

[The court then discussed the Supreme Court's ruling in *Board of Curators, Univ. of Mo. v. Horowitz*.]

Considering Princeton's status as a private university under our law, *State v. Schmid*, we believe that the principles set forth in the cases cited above, culminating with *Board of Curators, Univ. of Mo. v. Horowitz*, accurately state our law with respect to the proceedings here under review. We agree with the trial judge that he should not have become a super-trier under due process considerations.

In support of our conclusion we note that deference has always been afforded to the internal decision-making process under our law of associations. In *Higgins v. American Society of Clinical Pathologists*, 51 N.J. at 202, our Supreme Court held that the members of an association are generally bound by its private law....

Plaintiff persists, however, in her contention that the charge of plagiarism against her was not proved by the University before the COD and that the trial judge should have conducted a full hearing on the substantive offense. No authority is cited to us to support this view, and we know of none. The trial judge was required to review the evidence before the COD and to determine whether the evidence presented was sufficient to support the charge of plagiarism. He concluded, regardless whether he found the evidence sufficient, substantial or under any standard of evidence required, that the charge of plagiarism against plaintiff was proved. Having reached this conclusion, his task was completed. He was not obliged to conduct a full-fledged hearing on that substantive issue. As was stated in *Slaughter v. Brigham Young Univ., supra:*

> When the courts lay down requirements for procedural due process in these situations as required by the Constitution, and when the school administrators follow such requirements (and other basic conditions are met), some weight must then be given to their determination of the facts when there is substantial evidence to support

> it. Thus if the regulations concerned are reasonable; if they are known to the student or should have been; if the proceedings are before the appropriate persons with authority to act, to find facts, or to make recommendations; and if procedural due process was accorded the student, then the findings when supported by substantial evidence must be accorded some presumption of correctness. The adequacy of the procedure plus the substantial evidence element constitute the basis and the record to test whether the action was arbitrary. The fact-finding procedures were adequate [514 F.2d at 625].

Our independent examination of the record satisfies us that the COD properly concluded that plaintiff had plagiarized. Her paper constitutes a mosaic of the Ludmer work in an attempt to pass off Ludmer's ideas as plaintiff's own. While plaintiff persists in her argument that she did not intend to plagiarize and that there is nothing in the proofs to show that she did so intend, the mosaic itself is the loudest argument against her. The creation of that mosaic can only lead to one conclusion: that plaintiff intended to deceive her preceptor that the paper was original. An excerpt from the summary prepared by the COD with respect to the basis of its finding of intent is illuminating:

> A series of questions and comments concerning the contents of the paper followed Ms. Napolitano's presentation. It was pointed out that the entire paper consisted almost exclusively of a literal or slightly paraphrased rendering of various portions of the one secondary source used, without proper attribution, except in occasional instances. In addition, Professor Molloy and some members of the Committee mentioned a number of points in the paper which at the very least suggested that Ms. Napolitano did indeed intend to give the impression that the borrowings from her source were in fact her own. Among these were:
>
> > 1) A few statements from the source had been put in quotation marks but not the rest. This could indicate, on the other hand, that Ms. Napolitano had made an effort to use outside sources and, on the other, that the portions of the paper that were not in direct quotations were her own work.
> >
> > 2) The use, in the paper, of phrases such as "it is evident that," "it is important to note that," "one can assume that," etc. suggests that what

> follows is Ms. Napolitano's own thoughts and words, when in fact, in virtually all instances, what follows is words borrowed from the one source without attributions.
>
> 3) In several instances, there are quotes from the novel which is the subject of the paper. These quotes were used by the secondary source [the Ludmer text] to illustrate various points. In making these same points (usually using the words of the secondary source), Ms. Napolitano used the same quotes but changed the page numbers of the quotes to correspond to the edition of the novel used in the course. This gives the appearance that Ms. Napolitano had found the quotes herself in the novel, which, in fact, she did not.
>
> 4) The verb tenses in the material borrowed from the source were all changed to the present tense for the sake of consistency in the paper.
>
> 5) Small words and phrases from the borrowed source were deleted in cases where these words may have seemed too technical or awkward.

The COD did not accept plaintiff's explanations, finding them unsatisfactory, especially in light of the signed statement at the conclusion of the paper that it was her work in accordance with University regulations.

Plaintiff next argues that defendants denied her liberty and property interests without due process of law under N.J. Const. (1947), Art. I, par. 1. Plaintiff's argument under this point is buttressed principally by the holding of our Supreme Court in *State v. Schmid*. In *Schmid* defendant was convicted of criminal trespass based upon his distribution of political leaflets on the Princeton University campus. Schmid appealed his conviction on federal and state constitutional grounds. Plaintiff relies principally on an observation made by Justice Handler: "On numerous occasions our own courts have recognized the New Jersey Constitution to be an alternative and independent source of individual rights...." 84 N.J. at 555.

However, Schmid does not stand for the proposition advanced by plaintiff. Schmid's conviction was overturned by the Supreme Court because it was found that Princeton's regulations governing the distribution of literature and the promulgation of speech on the campus did not contain adequate standards. The arrest of Schmid for distribution, therefore, was arbitrary and, in the face of that finding, the conviction could not stand. This is a far cry from the argument that the New Jersey Constitution requires Princeton to grant its academic students due process rights not accorded to them under the federal constitution. We reject the argument.

Plaintiff's final argument relates to the penalty which was imposed upon her, the postponement of her degree for a period of one year until June 1983. The question of the penalty was troublesome to the trial judge. From the very institution of this action until the time he rendered his final decision, the judge expressed personal disagreement with the decision of the COD and President Bowen to defer the granting of plaintiff's degree from June 1982 until June 1983. Despite that disagreement the judge correctly held that he could not substitute his own views for those of a duly constituted administrative body within a private institution. He reached this conclusion and the holding as to the correctness of the penalty on the basis of the law of contracts. Plaintiff persists in arguing, however, that the penalty imposed demonstrates bias on the part of defendants because (a) the penalty imposed is inconsistent with penalties imposed in similar cases over the years and (b) it is actually "out of line" with the offense with which she was charged. We reject these arguments with the following observations.

Defendants in their brief describe plaintiff as maintaining a "strong" academic record at the University. [Here follows a list of laudatory comments about Napolitano, including the fact that she had earned a 3.7 grade point average and had completed all requirements for the baccalaureate degree in three years, while providing extensive support services for several athletic teams.]

It must be apparent that everyone involved in this action regarded plaintiff as a somewhat gifted if not unusual student of high achievement. She had obviously earned her place in the University community by her achievements. Under those circumstances should not the community of Princeton University have been entitled to expect more of plaintiff? Should not the reaction of a University community such as that at Princeton been one of dismay? We merely pose these questions. We do not answer them. We pose them principally because of plaintiff's persistent complaints that the University did not "prove" that she was a plagiarist, especially in the face of her continued denials of plagiarism or the intent to deceive Professor Molloy. It is apparent to us that plaintiff has neglected to view her position in the university community and the effect that the charges against her have had on the entire community.

Viewed in this light, we find little purpose in reviewing plaintiff's argument which attempts to demonstrate that in 20 or more disciplinary cases arising out of the same or similar incidents the individuals there involved were not penalized as severely as she was. To us this is totally irrelevant. Each penalty obviously must be tailored to the offense committed, and the offense committed must be viewed with regard to the offender and the community. We believe it is readily ascertainable that the University softened the penalty because of the status that plaintiff had attained in the University community and the fact that she had never transgressed any of the University regulations before. Recall that this incident occurred at the beginning of the second semester. Precedent would permit the COD and the President to have imposed a penalty of suspension for the entire second semester, with the result that plaintiff would have had to repeat that semester during the winter and spring of 1983 at the additional expense of another tuition. Under the penalty imposed, plaintiff was permitted to continue her work and complete her requirements for her degree. Her penalty was that the degree was not awarded to her and will not be until June 1983. We find nothing unreasonable in this determination.

One last observation. Plaintiff claims that the penalty is supposed to provide something educative in its imposition. She argues that the penalty here is improper because there is no educational value to be found in it. Perhaps plaintiff's self-concern blinds her to the fact that the penalty imposed on her, as a leader of the University community, has to have some educative effect on other student members of the community. In addition, to paraphrase the poet, "the child is mother to the woman," we believe that the lesson to be learned here should be learned by Gabrielle Napolitano and borne by her for the rest of her life. We are sure it will strengthen her in her resolve to become a success in whatever endeavor she chooses.

The judgment of the Chancery Division is affirmed, with no costs to any party.

Notes and Questions

1. Note the standard of review used by the trial judge. The infraction is characterized as academic fraud; if the court had viewed it as "general misconduct," would the plaintiff have been entitled to a different standard of review? To a *de novo* trial? Is the line between academic judgment cases and misconduct cases always clear? Was it as clear in this case as the court would have you believe?

2. Should the standard of review employed in this case be used for litigation involving student misconduct as well as for litigation involving academic performance? For litigation against public institutions as well as private?

3. The *Ewing* case (§ 4.7.1. above) had not yet been decided by the U.S. Supreme Court when the court in *Napolitano* issued its opinion. What guidance, if any, could this court have obtained from *Ewing*?

4. What if the professor who discovered the plagiarism simply gave the student an "F" and did not pursue the disciplinary process? Do faculty have the right to make such judgments as part of their academic freedom? Could the student have challenged such a faculty judgment if it were not preceded by notice and hearing or other procedural protections for the student?

5. For a general discussion of standards of judicial review, see *LHE* § 1.4.3.6.

SECS. 4.7. & 4.8. Grades, Credits, and Degrees and *Procedures for Suspension, Dismissal and Other Sanctions.*

Problem 9

The Provost's office of a large public university has received a lengthy petition from a graduate student in psychology who was recently dismissed from the doctoral program. University records indicate that the student had been enrolled as a full-time doctoral student for 6 semesters. An explanatory note on the student's record indicates that "a pattern of insufficient academic performance in the past two semesters, in course work, clinical field work, and the qualifying exam," was the basis for the dismissal. The dismissal had been recommended by the graduate faculty of the psychology department's clinical psychology program, approved by the psychology department faculty, and further approved by the Dean of the Graduate School of Arts and Sciences.

The graduate school catalogue, along with various departmental announcements distributed to graduate students, sets forth the requirements for the award of doctoral degrees. For the doctoral degree in psychology, the catalogue establishes a dissertation requirement and states that, prior to beginning the dissertation, a student "must have (1) successfully completed all course work specified by the departmental faculty, and (2) received a passing grade on the written and oral qualifying examination." The catalogue also states that "students must demonstrate competence in an area of specialization and the ability to meet the generally accepted academic or professional standards of the discipline in which the degree is to be obtained." Further, the catalogue states that "no official time limits have been imposed on acquiring the doctoral degree."

In his petition, the student challenges his dismissal and makes these points:

> (1) "I had a good academic record during my first four semesters. I had a "B" average. This performance indicates that I am capable of meeting the psychology department's standards."
>
> (2) "I did fail one course during my fifth semester, but that was because the professor misled me and others concerning the final exam instructions. (The course grade was based entirely on the final exam.) The professor told us during the course and again just before the exam that we would have to do 3 of the 5 questions on the exam;

instead, the actual directions, used in grading our exams, required that we do 4 of the 5 questions. I relied on the professor's statements in studying for the exam and in taking the exam, and I failed because I got a zero for the fourth question that I did not do."

(3) "I also did fail my clinical field work in my sixth semester, but I consider this assessment of my work to be very unfair. First, this was my very first clinical experience. Second, my field supervisor, upon whose recommendation the failing grade was based, spent very little time with me and gave me almost no feedback on my work either during or at the conclusion of my fieldwork. Third, the psychology department did not give me or my field supervisor any evaluative standards by which my work would be judged."

(4) "I took my qualifying exam near the end of my sixth semester. I had to have a combined score of at least 70.00 on the oral and written parts in order to pass. The score I actually received was 69.73! I think that this score should be rounded up to 70.00 and considered a passing score. If not, I at least think that I should be allowed to take the qualifying exam over again; other students in the past have been allowed to do so."

Based on current knowledge, there is no reason to believe that any of the facts stated in the petition are untrue. The Provost must now decide whether and how to respond to the petition and whether to take any other action as a result of having received the petition.

Does the law constrain the Provost in her decision making on this matter? How so? Is there any other information the Provost would need to have before ruling on this petition? If so, why is this information needed?

If the Provost denies the petition, would the student have substantial grounds for suing the school? What arguments might the student make, and what relief could he request?

SEC. 4.9. Student Protest and Demonstrations.

Shamloo v. Mississippi State Board of Trustees
620 F.2d 516 (5th Cir. 1980)

This case is set out on pp. 502-505 in *LHE*.

Notes and Questions

1. What standard does the court use to determine whether the protest is so disruptive as to lose its protection under the First Amendment? What kind of testimony is necessary to apply this standard to particular cases? Who bears the burden of proof on whether the standard is met? What are some examples of protest activity that would be unprotected?

2. The court discusses a similar regulation that was upheld in *Bayless v. Martine*. What is the relevant difference(s) between the two regulations? Why is this difference(s) important to freedom of speech concerns? Do you agree that the regulation in *Bayless* is consistent with the First Amendment?

3. Why is a vague regulation of speech constitutionally offensive? What dangers does it foster?

4. Jackson State's regulation provided that demonstrations must be approved by university administrators and that permission to demonstrate be sought at least three days in advance of the planned demonstration. Is such a requirement consistent with the free speech clause of the First Amendment? How would a court analyze a challenge to such an approval requirement and waiting period? See *LHE* § 4.9.3.

5. Would a public university's flat prohibition on building or placing of anti-apartheid shanties (flimsy structures used to symbolize the inhumane conditions of apartheid) on campus violate the First Amendment? How should a court analyze such a regulation if it were challenged and how might a university revise such a regulation to maximize its case for constitutionality? See *Students Against Apartheid Coalition v. O'Neil, LHE*, § 4.9.2., p. 506.

6. For more on student protests, see Problem-Solving Exercise C in Part III of this *Supplement*.

Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University

993 F.2d 386 (4th Cir. 1993)

SPROUSE, Senior Circuit Judge:

George Mason University [a state university in Virginia] appeals from a summary judgment granted by the district court to the IOTA XI Chapter of Sigma Chi Fraternity in its action for declaratory judgment and an injunction seeking to nullify sanctions imposed on it by the University because it conducted an "ugly woman contest" with racist and sexist overtones. We affirm.

I

Sigma Chi has for two years held an annual "Derby Days" event, planned and conducted both as entertainment and as a source of funds for donations to charity. The "ugly woman contest," held on April 4, 1991, was one of the "Derby Days" events. The Fraternity staged the contest in the cafeteria of the student union. As part of the contest, eighteen Fraternity members were assigned to one of six sorority teams cooperating in the events. The involved Fraternity members appeared in the contest dressed as caricatures of different types of women, including one member dressed as an offensive caricature of a black woman. He was painted black and wore stringy, black hair decorated with curlers, and his outfit was stuffed with pillows to exaggerate a woman's breasts and buttocks. He spoke in slang to parody African-Americans.

There is no direct evidence in the record concerning the subjective intent of the Fraternity members who conducted the contest. The Fraternity, which later apologized to the University officials for the presentation, conceded during the litigation that the contest was sophomoric and offensive.

Following the contest, a number of students protested to the University that the skit had been objectionably sexist and racist. Two hundred forty-seven students, many of them members of the foreign or minority student body, executed a petition, which stated: "We are condemning the racist and sexist implications of this event in which male members dressed as women. One man in particular wore a black face, portraying a negative stereotype of black women."

On April 10, 1991, the Dean for Student Services, Kenneth Bumgarner, discussed the situation with representatives of the objecting students. That same day, Dean Bumgarner met with student representatives of Sigma Chi, including the planners of and participants in the "ugly woman contest." He then held a meeting with members of the student government and other student leaders. In this meeting, it was agreed that Sigma Chi's behavior had created a hostile learning environment for women and blacks, incompatible with the University's mission.

The Dean met again with Fraternity representatives on April 18, and the following day advised its officers of the sanctions imposed. They included suspension from all activities for the rest of the 1991 spring semester and a two-year prohibition on all social activities except pre-approved pledging events and pre-approved philanthropic events with an educational purpose directly related to gender discrimination and cultural diversity. The University's sanctions also required Sigma Chi to plan and implement an educational program addressing cultural differences, diversity, and the concerns of women. A few weeks later, the University made minor modifications to the sanctions, allowing Sigma Chi to engage in selected social activities with the University's advance approval.

On June 5, 1991, Sigma Chi brought this action under 42 U.S.C. § 1983 against the University and Dean Bumgarner . It requested declaratory judgment and injunctive relief to nullify the sanctions as violative of the First and Fourteenth Amendments. Sigma Chi moved for summary judgment on its First Amendment claims on June 28, 1991, filing with its motions numerous affidavits explaining the nature of the "ugly woman contest." Also submitted were large glossy photographs of the participants as they appeared in the skits, including photographs of the Fraternity member depicting the offensive caricature of the black woman.

In addition to the affidavit of Dean Bumgarner explaining his meetings with student leaders, the University submitted the affidavits of other officials, including that of University President George W. Johnson and Vice-President Earl G. Ingram. President Johnson, by his affidavit, presented the "mission statement" of the University:

> (3) George Mason University is committed to promoting a culturally and racially diverse student body....Education here is not limited to the classroom.
>
> (4) We are committed to teaching the values of equal opportunity and equal treatment, respect for diversity, and individual dignity.

> (5) Our mission also includes achieving the goals set forth in our affirmative action plan, a plan incorporating affirmative steps designed to attract and retain minorities to this campus....

Vice President Earl G. Ingram's affidavit represented:

> (6) The University's affirmative action plan is a part of an overall state plan designed, in part, to desegregate the predominately "white" and "black" public institutions of higher education in Virginia....The behavior of the members of Sigma Chi that led to this lawsuit was completely antithetical to the University's mission, as expressed through its affirmative action statement and other pertinent University policies, to create a non-threatening, culturally diverse learning environment for students of all races and backgrounds, and of both sexes.
>
> (7) While the University has progressed in attracting and retaining minority students, it cannot expect to maintain the position it has achieved, and make further progress on affirmative action and minority issues that it wishes to make, if behavior like that of Sigma Chi is perpetuated on this campus.

The district court granted summary judgment to Sigma Chi on its First Amendment claim.

* * * *

III

We initially face the task of deciding whether Sigma Chi's "ugly woman contest" is sufficiently expressive to entitle it to First Amendment protection. From the mature advantage of looking back, it is obvious that the performance, apart from its charitable fund-raising features, was an exercise of teenage campus excess. With a longer and sobering perspective brought on by both peer and official disapproval, even the governing members of the Fraternity recognized as much. The answer to the question of whether the First Amendment protects the Fraternity's crude attempt at entertainment, however, is all the more difficult because of its obvious sophomoric nature.

A

First Amendment principles governing live entertainment are relatively clear: short of obscenity, it is generally protected.

* * * *

Thus, we must determine if the skit performed by Sigma Chi comes within the constitutionally protected rubric of entertainment. Unquestionably, some forms of entertainment are so inherently expressive as to fall within the First Amendment's ambit regardless of their quality.

* * * *

[I]t appears that the low quality of entertainment does not necessarily weigh in the First Amendment inquiry. It would seem, therefore, that the Fraternity's skit, even as low-grade entertainment, was inherently expressive and thus entitled to First Amendment protection. . . .

B

The University nevertheless contends that discovery will demonstrate that the contest does not merit characterization as a skit but only as mindless fraternity fun, devoid of any artistic expression. It argues further that entitlement to First Amendment protection exists only if the production was intended to convey a message likely to be understood by a particular audience. See *Texas v. Johnson*, 491 U.S. 397, 404, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989)....

As indicated, we feel that the First Amendment protects the Fraternity's skit because it is inherently expressive entertainment. Even if this were not true, however, the skit, in our view, qualifies as expressive conduct under the test articulated in *Texas v. Johnson*....[T]he intent to convey a message can be inferred from the conduct and the circumstances surrounding it. Thus viewed, the University's argument is self-defeating.

* * * *

Importantly, the affidavits [of university officials] establish that the punishment was meted out to the Fraternity because its boorish message had interfered with the described University mission.

It is manifest from these circumstances that the University officials thought the Fraternity intended to convey a message. The Fraternity members' apology and post-conduct contriteness suggest that they held the same view. To be sure, no evidence suggests that the Fraternity advocated segregation or inferior social status for women. What is evident is that the Fraternity's purposefully nonsensical treatment of sexual and racial themes was intended to impart a message that the University's concerns, in the Fraternity's view, should be treated humorously.

* * * *

IV

If this were not a sufficient response to the University's argument, the principles relating to content and viewpoint discrimination recently emphasized in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), provide a definitive answer. Although the Court in *St. Paul* reviewed the constitutional effect of a city "hate speech" ordinance, and we review the constitutionality of sanctions imposed for violating University policy, *St. Paul*'s rationale applies here with equal force. Noting that St. Paul's city ordinance prohibited displays of symbols that "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender," but did not prohibit displays of symbols which would advance ideas of racial or religious equality, Justice Scalia stated: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 2541, 2547.

As evidenced by their affidavits, University officials sanctioned Sigma Chi for the message conveyed by the "ugly woman contest" because it ran counter to the views the University sought to communicate to its students and the community. The mischief was the University's punishment of those who scoffed at its goals of racial integration and gender neutrality, while permitting, even encouraging, conduct that would further the viewpoint expressed in the University's goals and probably embraced by a majority of society as well. "The First Amendment generally prevents government from proscribing . . . expressive conduct because of disapproval of the ideas expressed." *Id.* at 2542 (citing *Johnson*, 491 U.S. at 406).

The University, however, urges us to weigh Sigma Chi's conduct against the substantial interests inherent in educational endeavors. See *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). The University certainly has a substantial interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education. Yet it seems equally apparent that it has available numerous alternatives to imposing punishment on students based on the viewpoints they express. We agree wholeheartedly that it is the University officials' responsibility, even their obligation, to achieve the goals they have set. On the other hand, a public university has many constitutionally permissible means to protect female and minority students. We must emphasize, as have other courts, that "the manner of [its action] cannot consist of selective limitations upon speech." *St. Paul*, 112 S. Ct. at 2548....The University should have accomplished its goals in some fashion other than silencing speech on the basis of its viewpoint.

The decision of the district court is affirmed.

AFFIRMED

MURNAGHAN, Circuit Judge, concurring in judgment:

* * * *

The present case can be decided easily within the contours of First Amendment law simply by holding that George Mason University's action violated the Fraternity members' rights by punishing them post hoc and in conflict with its tacit approval of their performance. Instead, the majority ranges far to discuss what it has concluded the law would be absent such permission.

* * * *

George Mason's treatment of the Fraternity is not itself constitutionally flawed, because the University was concerned about the message of the students' performance, but because of the permission to give the performance which the University granted. The University, following the Fraternity's performance of the skit, meted out punishment to the Fraternity, without any prior indication that such behavior was not allowed at school-sanctioned events, and despite indicating that the Fraternity's skit had University approval.

Actually, forbidding the skit or requiring substantial amendment was not beyond its power. The University does have greater authority to regulate expressive conduct within its confines as a result of the unique nature of the educational forum. *Tinker v. Des Moines School District*, 393 U.S. 503, 513, 89 S. Ct. 733 (1969).

* * * *

In the present case, the University, by officially recognizing Greek-letter social organizations and participating in the planning of their events, inevitably has participated in the activities of those groups. Therefore, it must retain the ability to refuse to sanction certain behavior which infringes on the rights of other students. The University need not allow activity distinctly injurious to its objectives.

Certainly, the most fundamental concern of a university is to provide the optimum conditions for learning. The majority concedes that "the University certainly has a substantial interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education." Therefore, the University must have some leeway to regulate conduct which counters that interest, and thereby infringes upon the right of other students to learn. See *Tinker*, 393 U.S. at 513; cf. *R.A.V.*, U.S. at , 112 S. Ct. at 2565 (Stevens, J. concurring) ("A selective proscription of unprotected expression designed to protect 'certain persons or groups' would be constitutional if it were based on a legitimate determination that the harm created by the regulated expression differs from that created by the unregulated expression.").

By concluding that a university must be allowed to regulate expressive conduct which runs directly counter to its mission, I do not mean to imply that a university has the unrestricted power to silence entirely certain perspectives. I wholeheartedly believe that the free exchange of ideas and debate are fundamental to a place of learning. Yet, they comprise only part of a university's mission and must be balanced against a university's other interests, especially those interests which rise to the level of constitutional significance. Moreover, if the University, in advance, had refused to allow the Fraternity to perform its intended skit, the marketplace of ideas would hardly have been endangered. The Fraternity, if it wished, could have presented its ideas and perspectives on the value of women and Blacks in an open debate, allowing other students to challenge its perspective.

Notes and Questions

1. How did the court determine that the fraternity's action was "speech" within the meaning of the First Amendment -- rather than conduct that could not be considered speech and therefore was not protected by the First Amendment?

2. The court considered the university's sanctions against the fraternity to be a "viewpoint" based restriction on speech, or "viewpoint" discrimination. Is this a fair characterization of the

university's action? Why or why not? Also, why are viewpoint restrictions especially suspect and disfavored under the First Amendment; what is the fault or evil that resides in such restrictions?

3. Consider the main point being made by the concurring judge. What role does the university's mission play in this judge's reasoning? Do you agree that a public college or university should have more leeway to regulate offensive speech of students on its campus than a state or local government would have to regulate offensive speech of citizens within its borders? See generally Byrne, "Racial Insults and Free Speech Within the University," 79 *Georgetown L.J.* 399 (1991).

4. Suppose the dean and university had learned in advance of the fraternity's plans and had refused to allow the fraternity to hold the ugly woman contest. Would this be a different case? One that the university would be more likely to win? See *LHE* §§ 4.9.3., 4.11.1., and 4.12.1.

5. Would mediation have been a feasible and useful process for the university to employ here rather than sanctions? How might the university have structured a mediation process? What effect might such a process have had that would be different from the effect of sanctions?

6. This case is discussed at pp. 512-513 and 535-536 in *LHE*. For more on hate speech (in addition to *LHE* § 4.10.), see Problem-Solving Exercise E in Part III of this *Supplement.*

Widmar v. Vincent
454 U.S. 263 (1981)

This case is set out on pp. 526-530 in *LHE*.

Notes and Questions

1. What roles, respectively, do the free speech clause and the establishment clause play in this case? What relationship does the Court forge between the two clauses? Is the Court simply stating that, when the two clauses are in conflict with one another, the free speech clause will prevail -- or is the analysis more subtle than that? (For background on the establishment clause and the related free exercise clause of the First Amendment, see *LHE*, § 1.6.)

2. What role does "forum" or "public forum" analysis play in this case? How and why would the result have differed had the university not maintained a "forum" available to student organizations? See generally *LHE*, § 4.9.2., p. 501.

3. Would any of the Court's reasoning in *Widmar* have application to the student ski club or student hiking club? How about a student philosophy club? The young socialists club? See generally *LHE* § 4.11.1.

4. Suppose you are an administrator or counsel for a large public institution with many and varied student activities, and you have been asked to devise a written policy to govern student use of campus facilities. What questions should you ask and what considerations should you take into account? How would *Widmar* constrain your policy making?

5. Courts have recently been asked to decide whether public colleges and universities must allocate student fees to overtly religious student groups. Is there a constitutional difference between allocating space to a religious student organization (as in *Widmar*) and allocating a potion of the mandatory student fee funds (as in the recent cases)? For a discussion of some

of the recent cases, see *LHE*, § 4.11.4., pp. 530-532. The *Rosengerger* case (*LHE* pp. 530-531) was reviewed by the U.S. Supreme Court, with a decision expected in June 1995.

SEC. 4.11. Student Organizations.

Problem 10[*]

Midstate University is a public university. In the last few years, several student organizations have been established at the university that focus, in whole or in part, on religious worship and the solicitation of new members. The New Light Fellowship, a student group affiliated with a known religious organization, has been active on campus for two years. It is recognized by the Student Government Association and thus receives funding from the mandatory student fees and is allowed to hold meetings in the Student Union. Meetings are devoted to prayer and to discussions of religious philosophy.

One of the credos of the New Light Fellowship is the separation of the races. The group will not allow students of color to join the prayer meetings or the religious discussions. Members believe that this practice is religiously based, and derives from a literal interpretation of the Bible.

The Association of Black Students (ABS) has learned about the practices of New Light Fellowship; ABS has protested to university officials about the existence of such a group on campus, its funding from mandatory student fees, and its use of campus facilities. The ABS students believe that their freedom of association is violated if any part of their mandatory fees is used to operate the Student Union or is allocated to the Fellowship through the student government. They argue that such funding violates the Establishment Clause of the U.S. Constitution.

The ABS has filed a lawsuit in federal district court, seeking to enjoin the university from providing funding and student union space to the Fellowship.

Please advise the university president on the likelihood of ABS's success in this lawsuit. Please also consider whether the university should redraft its policies for recognition of student organizations and for allocating student fees to student organizations.

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[*] With thanks to Dean James Brooks of William Mitchell College of Law, who drafted the problem from which this problem is adapted.

SECS. 4.13.2. & 4.13.3. Permissible Scope of Regulation and *Obscenity.*

Papish v. Board of Curators of the University of Missouri
410 U.S. 667 (1973)

PER CURIAM

Petitioner, a graduate student in the University of Missouri School of Journalism, was expelled for distributing on campus a newspaper "containing forms of indecent speech"[1] in violation of a bylaw of the Board of Curators. The newspaper, the *Free Press Underground*, had been sold on this state university campus for more than four years pursuant to an authorization obtained from the University Business Office. The particular newspaper issue in question was found to be unacceptable for two reasons. First, on the front cover the publishers had reproduced a political cartoon previously printed in another newspaper depicting policemen raping the State of Liberty and the Goddess of Justice. The caption under the cartoon read: "...With Liberty and Justice for All." Secondly, the issue contained an article entitled "M-----f----- Acquitted," which discussed the trial and acquittal on an assault charge of a New York City youth who was a member of an organization known as "Up Against the Wall, M-----f-----."

Following a hearing, the Student Conduct Committee found that petitioner had violated Par. B of Art. V of the "General Standards of Student Conduct," which requires students "to observe generally accepted standards of conduct" and specifically prohibits "indecent conduct or speech."[2] Her expulsion, after affirmance first by the Chancellor of the University and then by its Board of Curators, was made effective in the middle of the spring semester. Although she was then permitted to remain on campus until the end of the semester, she was not given credit for the one course in

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[*1] This charge was contained in a letter from the University's Dean of Students, which is reprinted in the Court of Appeals' opinion. 464 F.2d 136, 139 (CA8 1972).

[*2] In pertinent part, the bylaw states: "Students enrolling in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe generally accepted standards of conduct....Indecent conduct or speech...are examples of conduct which would contravene this standard...." 464 F.2d, at 138.

which she made a passing grade.[3]

After exhausting her administrative review alternatives within the University, petitioner brought an action for declaratory and injunctive relief pursuant to 42 U. S. C. § 1983 in the United States District Court for the Western District of Missouri. She claimed that her expulsion was improperly premised on activities protected by the First Amendment. The District Court denied relief, 331 F.Supp. 1321, and the Court of Appeals affirmed, one judge dissenting. 464 F.2d 136....

The District Court's opinion rests, in part, on the conclusion that the banned issue of the newspaper was obscene. The Court of Appeals found it unnecessary to decide that question. Instead, assuming that the newspaper was not obscene and that its distribution in the community at large would be protected by the First Amendment, the court held that on a university campus "freedom of expression" could properly be "subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures." *Id.*, at 145. The court concluded that "the Constitution does not compel the University...[to allow] such publications as the one in litigation to be publicly sold or distributed on its open campus." *Ibid.*

This case was decided several days before we handed down *Healy v. James*, 408 U.S. 169 (1972), in which, while recognizing a state university's undoubted prerogative to enforce reasonable rules governing student conduct, we reaffirmed that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Id.*, at 180. See *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). We think Healy makes it clear that the mere dissemination of ideas -- no matter how offensive to good taste -- on a state university campus may not be shut off in the name alone of "conventions of decency." Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected. E.g., *Kois v. Wisconsin*, 408 U.S. 229 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971). There is language in the opinions below that suggests that the University's action here could be viewed as an exercise of its legitimate authority to enforce reasonable regulations as to the time, place, and manner of speech and its dissemination. While we have repeatedly approved such regulatory authority, e.g., *Healy v. James*, 408 U.S., at 192-193, the facts set forth in the opinions below show clearly that petitioner was expelled because of the disapproved content of the newspaper rather than the time, place, or manner of its distribution.[4]

---

[3] Miss Papish, a 32-year-old graduate student, was admitted to the graduate school of the University in September 1963. Five and one-half years later, when the episode under consideration occurred, she was still pursuing her graduate degree. She was on "academic probation" because of "prolonged submarginal academic progress," and since November 1, 1967, she also had been on disciplinary probation for disseminating Students for a Democratic Society literature found at a university hearing to have contained "pornographic, indecent and obscene words." This dissemination had occurred at a time when the University was host to high school seniors and their parents. 464 F.2d, at 139 nn. 3 and 4. But disenchantment with Miss Papish's performance, understandable as it may have been, is no justification for denial of constitutional rights.

Since the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech, and because the state University's action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct, the judgments of the courts below must be reversed. Accordingly the petition for a writ of certiorari is granted, the case is remanded to the District Court, and that court is instructed to order the University to restore to petitioner any course credits she earned for the semester in question and, unless she is barred from reinstatement for valid academic reasons, to reinstate her as a student in the graduate program.

Reversed and remanded.

MR. CHIEF JUSTICE BURGER, dissenting.

I join the dissent of JUSTICE REHNQUIST which follows and add a few observations.

"[4] It is true, as MR. JUSTICE REHNQUIST's dissent indicates, that the District Court emphasized that the newspaper was distributed near the University's memorial tower and concluded that petitioner was engaged in "pandering." The opinion makes clear, however, that the reference to "pandering" was addressed to the content of the newspaper and to the organization on the front page of the cartoon and the headline, rather than to the manner in which the newspaper was disseminated. 331 F.Supp., at 1325, 1328, 1329, 1330, 1332. As the Court of Appeals opinion states, "the facts are not in dispute." 464 F.2d, at 138. The charge against petitioner was quite unrelated to either the place or manner of distribution. The Dean's charge stated that the "forms of speech" contained in the newspaper were "improper on the University campus." *Id.*, at 139. Moreover, the majority below quoted without disapproval petitioner's verified affidavit stating that "no disruption of the University's functions occurred in connection with the distribution." *Id.*, at 139-140. Likewise, both the dissenting opinion in the Court of Appeals and the District Court opinion refer to this same uncontroverted fact. *Id.*, at 145; 331 F.Supp., at 1328. Thus, in the absence of any disruption of campus order or interference with the rights of others, the sole issue was whether a state university could proscribe this form of expression.

* * * *

Unlike...traditional First Amendment cases [involving criminal prosecutions], we deal here with rules which govern conduct on the campus of a state university. In theory, at least, a university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms. We provide that environment to the end that students may learn the self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable.

* * * *

Students are, of course, free to criticize the university, its faculty, or the Government in vigorous, or even harsh, terms. But it is not unreasonable or violative of the Constitution to subject to disciplinary action those individuals who distribute publications which are at the same time obscene and infantile. To preclude a state university or college from regulating the distribution of such obscene materials does not protect the values inherent in the First Amendment; rather, it demeans those values. The anomaly of the Court's holding today is suggested by its use of the now familiar "code" abbreviation for the petitioner's foul language.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

* * * *

I

Petitioner Papish has for many years been a graduate student at the University of Missouri. Judge Stephenson, writing for the Court of Appeals in this case, summarized her record in these words:

> "Miss Papish's academic record reveals that she was in no rush to complete the requirements for her graduate degree in Journalism. She possesses a 1958

> academic degree from the University of Connecticut; she was admitted to graduate school at the University of Missouri in September in 1963; and although she attended school through the fall, winter, and summer semesters, she was, after 6 years of work, making little, if any, significant progress toward the achievement of her stated academic objective. At the time of her dismissal, Miss Papish was enrolled in a one-hour course entitled 'Research Journalism' and in a three-hour course entitled 'Ceramics 4.' In the semester immediately preceding her dismissal, she was enrolled only in 'Ceramics 3.'" 464 F.2d, at 138 n. 2.

Whatever may have been her lack of ability or motivation in the academic area, petitioner had been active on other fronts. In the words of the Court of Appeals:

> "3. On November 1, 1967, the Faculty Committee on Student Conduct, after notice of charges and a hearing, placed Miss Papish on disciplinary probation for the remainder of her student status at the University. The basis for her probation was her violation of the general standard of student conduct ....This action arose out of events which took place on October 14, 1967 at a time when the University was hosting high school seniors and their parents for the purpose of acquainting them with its educational programs and other aspects of campus life. She specifically was charged, inter alia, with openly distributing, on University grounds, without the permission of appropriate University personnel, two non-University publications of the Students for Democratic Society (SDS). It was alleged in the notice of charges, and apparently established at the ensuing hearing, that one of these publications, the *New Left Notes*, contained 'pornographic, indecent and obscene words, "f---," "bull s---," and "sh--s."' The notice of charges also recites that the other publication, *The CIA at College: Into Twilight and Back*, contained 'a pornographic and indecent picture depicting two rats apparently fornicating on its cover....'
>
> "4. Some two weeks prior to the incident causing her dismissal, Miss Papish was placed on academic probation because of prolonged submarginal academic progress. It was a condition of this probation that she pursue satisfactory work on her thesis, and that such work be evidenced by the completion and presentation of several completed chapters to her thesis advisor by the end of the semester. By letter dated January 31, 1969, Miss Papish was notified that her failure to comply with this

> special condition within the time specified would result in the termination of her candidacy for a graduate degree." *Id.*, at 138-139, nn. 3, 4.

It was in the light of this background that respondents finally expelled petitioner for the incident described in the Court's opinion. The Court fails to note, however, two findings made by the District Court with respect to the circumstances under which petitioner hawked her newspaper near the memorial tower of the University:

> "The Memorial Tower is the central unit of integrated structures dedicated to the memory of those students who died in the Armed Services in World Wars I and II. Other adjacent units include the Student Union and a Non-Sectarian chapel for prayer and meditation. Through the Memorial Arch pass parents of students, guests of the University, students, including many persons under 18 years of age and high school students." 331 F.Supp. 1321, 1325 n. 4.
>
> "The plaintiff knowingly and intentionally participated in distributing the publication to provoke a confrontation with the authorities by pandering the publication with crude, puerile, vulgar obscenities." *Id.*, at 1325.

II

I continue to adhere to the dissenting views expressed in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), that the public use of the word "M-----f-----" is "lewd and obscene" as those terms were used by the Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). . . .

* * * *

A state university is an establishment for the purpose of educating the State's young people, supported by the tax revenues of the State's citizens. The notion that the officials lawfully charged with the governance of the university have so little control over the environment for which they are responsible that they may not prevent the public distribution of a newspaper on campus which contained the language described in the Court's opinion is quite unacceptable to me, and I would suspect would have been equally unacceptable to the Framers of the First Amendment. This is indeed a case where the observation of a unanimous Court in *Chaplinsky* that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" applies with compelling force.

III

The Court cautions that "disenchantment with Miss Papish's performance, understandable as it may have been, is no justification for denial of constitutional rights." Quite so. But a wooden insistence on equating, for constitutional purposes, the authority of the State to criminally punish with its authority to exercise even a modicum of control over the university which it operates, serves neither the Constitution nor public education well. There is reason to think that the "disenchantment" of which the Court speaks may, after this decision, become widespread among taxpayers and legislators....

Notes and Questions

1. How can colleges and universities legally regulate the distribution by students of material that some students, faculty, or community members might find offensive? Do private institutions have more latitude in such regulation than public institutions? See generally *LHE* § 4.13.5.

2. What legal guidelines should institutions follow in developing regulations regarding offensive or indecent student expression? See generally *LHE*, § 4.10., pp. 513-516.

3. Chief Justice Burger and Justice Rehnquist cite various reasons for disapproving the majority opinion. Do you agree with them? What implications do their views have for institutional academic freedom? For the academic freedom of students and faculty members?

4. For a case involving indecent or offensive speech by a faculty member, see *Martin v. Parrish*, sec. 3.7.2 above. How do you reconcile the result in *Papish* with the result in *Martin v. Parrish*; can you justify the greater protection for the student in the former than for the faculty member in the latter?

SEC. 4.13.4. Libel.

Mazart v. State
441 N.Y.S.2d 600 (Ct. Cl. 1981)

This case is set out on pp. 544-548 in *LHE*.

Notes and Questions

1. The plaintiffs argued that the university should be liable under the theory of *respondeat superior*. Why did the court reject this argument? According to the court, even if the student editors displayed poor judgment in publishing the libel, the university still is not responsible for their actions. Why not?

2. With regard to the publication of unsolicited material such as this letter to the editor, what procedures could the newspaper editors have developed to avoid liability for libel?

3. If the university had trained the student editors in appropriate editorial and journalistic procedures, would this fact have had any bearing on the legal analysis used or the outcome of the case? For example, would such training have implied greater institutional control over the student newspaper? Can a college or university attempt to insure responsible student conduct without incurring legal liability if students do not behave responsibly?

4. Could the newspaper's faculty advisor have refused to permit the student editors to publish the letter? Under what circumstances? What legal principles would apply to such an action by a faculty advisor? See *LHE* § 4.13.2. If such authority is lodged in a faculty advisor, would it increase the institution's risk of liability for libelous material that escapes the advisor's axe?

5. After reading this opinion, how would you recommend that a public institution of higher education structure its relationship with a student newspaper? Is the structure that will best insulate the institution from liability also the structure that is educationally or administratively the best?

6. What implications, if any, does this case have for private institutions of higher education?

SECS. 4.6, 4.8, 4.13. Disciplinary Rules and Regulations, Procedures for Suspension, Dismissal, and Other Sanctions, and *Student Press.*

Problem 11

The student newspaper at a public university has published a controversial article about a sophomore cheerleader in its annual humor issue. The newspaper is funded with student activity fees. The article purports to chronicle the cheerleader's intimate thoughts while leading cheers at a basketball game. The article is vulgar and probably offensive to many readers, and the object of the story is humiliated. The cheerleader and her parents are threatening to sue unless the institution punishes the student authors and editors and forces them to print a retraction in the student newspaper.

If you were the Dean of Students, what information would you seek? Would you consult legal counsel? If so, what questions would you ask and what advice would you request?

If you were the institution's legal counsel, what are the legal issues that you would address? How would you advise the Dean of Students to proceed?

Would your analysis change if a student had published this information on the Internet, using the university's computer system?

SEC. 4.14. Student Housing.

Piazzola v. Watkins

442 F.2d 284 (5th Cir. 1971)

OPINION: RIVES, Circuit Judge:

The district court granted habeas corpus to two Alabama prisoners and ordered their release. *Piazzola and Marinshaw v. Watkins*, M.D.Ala.1970, 316 F. Supp. 624. The appellants advance two contentions for reversal: (1) that the appellees have not exhausted the remedies available in the courts of the State as required by 28 U.S.C. § 2254; and (2) that the search and seizure which the district court found to be violative of appellees' Fourth Amendment rights were made pursuant to a constitutionally reasonable school regulation permitting such searches and seizures. We affirm.

By separate jury trials, each of the appellees was convicted of the offense of illegal possession of marijuana in the Circuit Court of Pike County, Alabama, and was sentenced to imprisonment for a period of five years.

* * * *

The State Court of Appeals affirmed both convictions without opinion, and the State Supreme Court granted motions to strike their petitions for certiorari....Their habeas corpus petition to the federal district court was submitted on a stipulation of facts which included, as Exhibit 1, a transcript of the testimony taken in the State Circuit Court on their motion to suppress evidence, and which further stipulated that "The only evidence against Petitioners is the marijuana allegedly found as a result of the search described in Exhibit 1."

The district court condensed the transcript of testimony into the following findings of fact:

> "On the morning of February 28, 1968, the Dean of Men of Troy State University was called to the office of the Chief of Police of Troy, Alabama, to discuss 'the drug problem' at the University. Two State narcotic agents and two student informers from Troy State University were also present. Later on that same day, the Dean of Men was called to the city police station for another meeting; at this time he was informed by the officers that they had sufficient evidence that marijuana was in

the dormitory rooms of certain Troy State students and that they desired the cooperation of University officials in searching these rooms. The police officers were advised by the Dean of Men that they would receive the full cooperation of the University officials in searching for the marijuana. The informers, whose identities have not yet been disclosed, provided the police officers with names of students whose rooms were to be searched. Still later on that same day (which was during the week of final examinations at the University and was to be followed by a weeklong holiday) the law enforcement officers, accompanied by some of the University officials, searched six or seven dormitory rooms located in two separate residence halls. The rooms of both Piazzola and Marinshaw were searched without search warrants and without their consent. Present during the search of the room occupied by Marinshaw were two State narcotic agents, the University security officer, and a counselor of the residence hall where Marinshaw's room was located. Piazzola's room was searched twice. Present during the first search were two State narcotic agents and a University official; no evidence was found at this time. The second search of Piazzola's room, which disclosed the incriminating evidence, was conducted solely by the State and City police officials.

"At the time of the seizure the University had in effect the following regulation:

> The college reserves the right to enter rooms for inspection purposes. If the administration deems it necessary, the room may be searched and the occupant required to open his personal baggage and any other personal material which is sealed.

Each of the petitioners was familiar with this regulation. After the search of the petitioners' rooms and the discovery of the marijuana, they were arrested, and the State criminal prosecutions and convictions ensued."

316 F. Supp. at 625.

* * * *

2. Validity of Search and Seizure

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" (emphasis added). The question is whether in the light of all of the facts and circumstances, including the University regulation, the search which disclosed the marijuana was an unreasonable search. The district judge made reasonableness the touchstone of his opinion as to the validity of the search. We find ourselves in agreement with his view that this search was unreasonable.

In a case where the facts were similar, *People v. Cohen*, 57 Misc.2d 366, 292 N.Y.S.2d 706, aff'd, 61 Misc.2d 858, 306 N.Y.S.2d 788, Judge Burstein said:

> The police and the Hofstra University officials admitted that they entered the room in order to make an arrest, if an arrest was warranted. This was, in essence, a fishing expedition calculated to discover narcotics. It offends reason and logic to suppose that a student will consent to an entry into his room designed to establish grounds upon which to arrest him. Certainly, there can be no rational claim that a student will self-consciously waive his Constitutional right to a lawful search and seizure. Finally, even if the doctrine of implied consent were imported into this case, the consent is given, not to police officials, but to the University and the latter cannot fragmentize, share or delegate it.

Another case somewhat in point on the facts is *Commonwealth v. McCloskey,* Appellant, 1970, 217 Pa.Super. 432, 272 A.2d 271. There the court reversed a student's marijuana conviction because the policemen who entered his dormitory room to execute a search warrant did not knock or announce their presence and purpose before entering. In part, Judge Cercone speaking for the majority of the court said:

> "It was the Commonwealth's position that the Fourth Amendment protections do not apply to a search of a college dormitory room. The test to be used in determining the applicability of the Fourth Amendment protections is whether or not the particular locale is one '* * * in which there was a reasonable expectation of freedom from governmental intrusion': *Mancusi v. DeForte*, 392 U.S. 364, 368, 88 S. Ct. 2120, 2124, 20 L. Ed. 2d 1154, 1159 (1968) (large office room shared by the defendant and other union officials)....A dormitory room is analogous to an apartment

or a hotel room. It certainly offers its occupant a more reasonable expectation of freedom from governmental intrusion than does a public telephone booth. The defendant rented the dormitory room for a certain period of time, agreeing to abide by the rules established by his lessor, the University. As in most rental situations, the lessor, Bucknell University, reserved the right to check the room for damages, wear and unauthorized appliances. Such right of the lessor, however, does not mean McCloskey was not entitled to have a 'reasonable expectation of freedom from governmental intrusion' or that he gave consent to the police search,[1] or gave the University authority to consent to such search.[2]

In the case of *Katz v. United States*, 1967, 389 U.S. 347, 88 S. Ct. 507, [a case to which Judge Cercone referred] the Court commented at some length on the concept of "constitutionally protected areas":

"[1] Voluntary consent must be proven by clear and positive evidence [*United States v. Smith,* 308 F.2d 657, 663 (2d Cir. 1962), cert. denied 372 U.S. 906, 83 S. Ct. 717, 9 L. Ed. 2d 716 (1963)], and the State has the burden of proof *[Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797, 802 (1968)]. Waiver of Fourth Amendment rights through consent to a search cannot be lightly inferred. See *Simmons v. Bomar*, 349 F.2d 365, 366 (6th Cir. 1965); *United States v. Como*, 340 F.2d 891, 893 (2d Cir. 1965). Every reasonable presumption is against one's waiver of his constitutional rights. *Weed v. United States*, 340 F.2d 827, 829 (10th Cir. 1965).

"[2] "In *Stoner v. California, supra*, a hotel clerk allowed the police to search a guest's room, and the Supreme Court there stated: 'It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent.' 376 U.S. at 489, 84 S. Ct. at 893, 11 L. Ed. 2d at 860. Many other cases have held that one in the position of a lessor cannot consent to a police search of a tenant's premises, even though the lessor, himself has a right to enter the room or apartment. See *United States v. Jeffers*, 342 U.S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951) and *Commonwealth v. Ellsworth*, 421 Pa. 169, 218 A.2d 249 (1966) (hotel proprietor let police into a guest's room); *Chapman v. United States*, 365 U.S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961) and *Cunningham v. Heinze*, 352 F.2d 1 (9th Cir. 1965) cert. denied 383 U.S. 968, 86 S. Ct. 1274, 16 L. Ed. 2d 309 (1966) (landlord allowed police search of tenant's room)."

"The petitioner has strenuously argued that the booth was a 'constitutionally protected area.' The Government has maintained with equal vigor that it was not.[8] But this effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case.[9] For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection....But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected....

"The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye -- it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office,[10] in a friend's apartment,[11] or in a taxicab,[12] a person in a telephone booth may rely upon the

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[*8] In support of their respective claims, the parties have compiled competing lists of 'protected areas' for our consideration. It appears to be common ground that a private home is such an area, *Weeks v. United States*, 232 U.S. 383, [34 S. Ct. 341, 58 L. Ed. 652], but that an open field is not. *Hester v. United States*, 265 U.S. 57, [44 S. Ct. 445, 68 L. Ed. 898. Defending the inclusion of a telephone booth in his list the petition cites *United States v. Stone*, D.C., 232 F. Supp. 396, and *United States v. Madison*, 32 L.W. 2243 (D.C.Ct.Gen.Sess.). Urging that the telephone booth should be excluded, the Government finds support in *United States v. Borgese*, D.C., 235 F. Supp. 286.

[*9] It is true that this Court has occasionally described its conclusions in terms of 'constitutionally protected areas,' see, e. g., *Silverman v. United States*, 365 U.S. 505, 510, 512, [81 S. Ct. 679, 5 L. Ed. 2d 734]; *Lopez v. United States*, 373 U.S. 427, 438-439, [83 S. Ct. 1381, 10 L. Ed. 2d 462]; *Berger v. New York*, 388 U.S. 41, 57, 59, [87 S. Ct. 1873, 18 L. Ed. 2d 1040], but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.

[*10] *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, [40 S. Ct. 182, 64 L. Ed. 319].

[*11] *Jones v. United States*, 362 U.S. 257, [80 S. Ct. 725, 4 L. Ed. 2d 697].

[*12] *Rios v. United States*, 364 U.S. 253, [80 S. Ct. 1431, 4 L. Ed. 2d 1688]." 389 U.S. at 351-352, 88 S. Ct. at 511.

protection of the Fourth Amendment. * * *

By a similar process of reasoning, we must conclude that a student who occupies a college dormitory room enjoys the protection of the Fourth Amendment. True the University retains broad supervisory powers which permit it to adopt the regulation heretofore quoted, provided that regulation is reasonably construed and is limited in its application to further the University's function as an educational institution.[2] The regulation cannot be construed or applied so as to give consent to a search for evidence for the primary purpose of a criminal prosecution. Otherwise, the regulation itself would constitute an unconstitutional attempt to require a student to waive his protection from unreasonable searches and seizures as a condition to his occupancy of a college dormitory room. Compare *Tinker v. Des Moines Independent Community School District*, 1969, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731. Clearly the University had no authority to consent to or join in a police search for evidence of crime.[5]

The right to privacy is "no less important than any other right carefully and particularly reserved to the people." *Mapp v. Ohio*, 1961, 367 U.S. 643, 657, 81 S. Ct. 1684, 1692, 6 L. Ed. 2d 1081. The results of the search do not prove its reasonableness. This search was an unconstitutional invasion of the privacy both of these appellees and of the students in whose rooms no evidence of marijuana was found. The warrantless search of these students' dormitory rooms cannot be justified. The judgment is therefore

Affirmed.

DISSENT: CLARK, Circuit Judge (concurring in part and dissenting in part).

I respectfully dissent from part 2 of the Court's opinion as to the defendant, Marinshaw. The college had a direct interest in keeping its dormitories free of the specific criminal activity here involved -- the possession of the drug, marihuana. The regulation was a reasonable means of embodying this interest. Cf. *Pratz v. Louisiana Polytechnic Institute*, 316 F. Supp. 872 (D.C.W.D.La., 1970), aff. 401 U.S. 1004, 91 S. Ct. 1252, 28 L. Ed. 2d 541 (1971). Marinshaw was found to be familiar with the regulation. When he chose to place the evidence of this criminal conduct in his dormitory room he knowingly exposed this material to inspections by officials of the University. He cannot now reinstate as private an area he had agreed was thus accessible. A publicly owned dormitory room is not in my mind the equivalent of a private rooming house. I concur in the result as to the defendant, Piazzola, because I do not believe the regulation can be validly construed to authorize the college to consent to an independent police search.

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[2] One of the "Residence Hall Policies" of this University provides that "College men are assumed to be mature adults with acceptable and established habits." Another adjures students, "Keep rooms locked at all times." The University thus recognized that it cannot exercise that strict control of its students which might be permitted in a boys' school where an *in loco parentis* standard would be more appropriate.

[5] As illustrated by the more intense second search of Piazzola's room, such a search involves a greater invasion of the student's privacy than can be justified by the University's supervisory interests.

In all other respects I concur in the opinion of the majority.

Notes and Questions

1. What legal distinction does the concurring/dissenting judge make between the situations of the two defendants? Should this be a relevant distinction? In what circumstances?

2. Under the reasoning of *Piazzola*, would students at a public institution also have a cognizable privacy interest in a laboratory desk or cabinet assigned to them? In a gym locker? In a work space in the office of a student organization?

5. Suppose the marijuana had been discovered by a maintenance worker who had entered the student's room to repair a broken window lock, noticed the marijuana in plain view on a dresser, and informed the head of campus security. May the maintenance worker or a campus security officer remove the marijuana for "safe-keeping?" May the head of security notify the local police? Must he or she do so? If the police search the room and seize the marijuana, would the student still be protected under the reasoning of *Piazzola*?

6. Suppose Piazzola's roommate had been in the residence hall room when the Dean and the police had knocked on the door, and the roommate admitted them to the room. Can the roommate give the police permission to search the room? If the marijuana is in plain view, may it be seized lawfully? May the police search Piazzola's closets and bureau drawers based on the roommate's consent?

SEC. 4.15.3.; see also SECS. 7.5.2. & 7.5.7.

Sex Discrimination, Title VI, and Scope and Coverage of Problems.

Problem 12[*]

A local private college is facing a severe budgetary shortfall, so administration officials have proposed a series of budget cuts to take effect at the end of the current academic year. The budget cuts are expected to affect numerous academic departments and extracurricular programs. Among its budget-reduction strategies, the administration has proposed eliminating several of the college's intercollegiate varsity athletic teams, including its men's swim team and its women's softball team. Members of these two teams vehemently oppose the cuts, and have filed separate administrative complaints and civil lawsuits in an effort to obtain immediate reinstatement of their respective programs.

The college does not receive any direct financial assistance from the federal government, but many of its students receive financial assistance in the form of Pell Grants, Direct Student Loans, and other federal student loans. Enrollment at the college is approximately 52% male and 48% female. Women's athletics teams at the college first reached varsity status in the early 1970s and continued to expand in number throughout the 1970s and 1980s. Women's softball was elevated from club to varsity status in 1985. Currently, women comprise approximately 39% of the athletes participating in varsity sports. After the budget cuts take effect, it is expected that women will comprise 38% of the college's participating varsity athletes. Since the announcement of the college's budget cuts, five of the thirteen members of this year's women's softball team have announced that they intend to transfer to other colleges. Although the men's swim team is among those teams that the college intends to eliminate, the women's varsity swim team, which has over 25 members, will be retained.

1. Is the college subject to the requirements of Title IX (does it receive federal financial assistance)? If so, is its athletic program subject to the requirements of Title IX?

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[*] With thanks to Allen Kropp, guest lecturer in the graduate school. George Washington University, who drafted the original problem from which this problem was adapted.

2. Has the college complied with Title IX's requirement that it effectively accommodate the interests and abilities of women students?

3. On which of OCR's three "benchmarks" for measuring effective accommodation of student athletes' interests and abilities might the college base its defense? What arguments could the college raise under each?

4. Have the members of the men's swim team been discriminated against on the basis of sex in violation of Title IX? What arguments could they raise, and how should the college respond?

5. What additional facts do you need before you can resolve this dispute?

Problem 13[*]

Several years ago, Joshua Sterling entered the State University as a freshman. He did well his first year, ending with a GPA of 3.5. In his sophomore year, Joshua declared his major to be English and took, as one of his fall electives, a course entitled British Authors. The final for this course was a 25 page essay on "The Influence of Samuel Johnson on American Writers." Joshua found himself in a time crunch and borrowed a course notebook from an upperclass fraternity brother who had taken the course a year earlier. The notebook contained an essay on the same topic with a grade of A written across the top. Although in the past Joshua had always been an honest student, he copied heavily from the fraternity brother's essay and turned in his essay to the professor in December.

The professor teaching the British Authors course became suspicious while reading Joshua's paper and compared it to the copy she had made of her previous year's "A" papers. She discovered the similarities between Joshua's and the fraternity brother's papers and filed a report of plagiarism with university officials. After an internal proceeding and hearing, Joshua was expelled from State University in February (the midst of his sophomore year). Joshua was told that he could re-apply for admission no sooner than one year from the date of expulsion.

Joshua re-applied to State University in the spring of the following year and was readmitted, but his admission was expressly conditioned on Joshua's agreement to divulge to any and all prospective employers and/or institutions of higher education the circumstances under which he was expelled. Joshua was further required to agree that faculty, staff, and administrators were free to make these same disclosures to any graduate admissions officers or prospective employers inquiring about Joshua. University administrators drafted a document that outlined the circumstances of the expulsion; this document was intended to be used as a model for Joshua to follow. Not realizing the grave consequences, Joshua agreed to the University's conditions.

Joshua re-entered State University at the sophomore level. He performed well in school and had no further instances of academic dishonesty. He graduated near the top of his class and decided to obtain a Masters degree in Journalism. After beginning the application process, he discovered that his transcript was distinctly marked up with information concerning his expulsion. When he approached English professors about writing letters of recommendation, he was repeatedly confronted with warnings that they would have to discuss the instance of plagiarism in any letters written on his behalf.

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[*] With thanks to Kathryn Bender, attorney in the General Counsel's office at Catholic University, who developed the original version of this problem.

It became apparent to Joshua that his agreement with the University was going to cripple his chances of getting into graduate school and of ever finding professional employment. The consequences were much more than he had anticipated. He and his parents are now seeking legal advice regarding his rights in this matter.

What are Joshua's legal rights? In particular, what rights does he now have in the privacy of records regarding his expulsion and re-admission? Has the University violated any of Joshua's rights? If so, by what means might Joshua (and his attorney) enforce his rights? What would the university need to do to remedy the violation (if any)?

Nero v. Kansas State University

861 P.2d 768 (Kan. 1993)

The opinion was delivered by ABBOTT, J.:

Shana Nero appeals from the trial court's grant of summary judgment to Kansas State University (KSU). At issue is whether KSU has a duty to protect residents of university residence halls and, if so, the nature and extent of that duty.

Shana Nero was sexually assaulted in a coed residence hall by a fellow residence hall student, Ramon Davenport.

Thirty-five days earlier, Ramon Davenport resided in Moore Hall, a coed residence hall at KSU. On that date, April 28, 1990, Ramon Davenport was accused of raping J.N., a female resident of Moore Hall.

The following Monday, April 30, 1990, because of the accusation of rape against Davenport and after consultation between KSU housing and student life administrators and staff members, Davenport was assigned temporarily to Marlatt Hall, an all-male residence hall on the other side of the campus. The Assistant Director of Housing, Dr. Rosanne Priote, sent Davenport a letter dated April 30, 1990, confirming the temporary residence hall assignment and requesting he not enter Moore Hall or Derby Food Center until further notice in order to provide "some physical distance" between J.N. and Davenport. After meeting with Davenport, Dr. Susan M. Scott, Associate Dean of Student Life, in a letter dated May 2, 1990, confirmed Davenport's voluntary agreement to be reassigned to Marlatt Hall for the remainder of the academic year. Dr. Scott also commented that because Davenport had agreed to the reassignment, KSU would not initiate immediately a university adjudication of the incident, but reserved the right to do so at a later date depending upon the outcome of the criminal charge. KSU does not have a set policy, practice, or procedure for removing from student housing a student accused of the rape or sexual assault of another student in a residence hall.

On May 2, 1990, Davenport was charged with rape in the Riley County District Court. He pleaded not guilty and was released on bond. The *Manhattan Mercury* and the *Kansas State Collegian* reported Davenport's arrest, the charge against him, his plea of not guilty, and his release on bond.

At the close of the 1989-90 academic year, only one residence hall, Goodnow Hall, was available for students attending intersession and summer school. Goodnow Hall was a coed residence hall.

Davenport moved into Goodnow Hall for the 1990 spring intersession, beginning May 18 and ending June 3. Shana Nero, a University of Oklahoma student, came to KSU for the intersession and was assigned to Goodnow Hall. Nero had two brief conversations with Davenport prior to June 2, 1990. She knew he was a KSU student living in the same residence hall.

On June 2, 1990, Nero was doing laundry and watching television in the basement recreation room of Goodnow Hall. Davenport came into the lounge and sexually assaulted her while the two of them were watching television.

On June 4, 1990, KSU terminated Davenport's summer school residence hall contract and instructed him to remove his belongings from Goodnow Hall by 8:00 p.m. that evening and not to enter any food service building or residence hall for any reason.

Nero brought a complaint against Davenport under KSU's Policy Prohibiting Sexual Violence, which had been adopted in 1989. Pursuant to Nero's complaint, Davenport was found to have violated the policy.

On August 29, 1990, Davenport pleaded guilty to the rape of J.N. In exchange for Davenport's plea on the rape charge, the sexual assault charge involving Nero was dropped.

Nero subsequently filed a negligence suit against KSU, alleging the university had a duty to protect her against Davenport's sexual advances and had failed to exercise reasonable care to do so. Nero also filed a claim of sexual assault and battery against Davenport. The trial court granted summary judgment against Davenport, and that judgment is not an issue in this appeal. The trial court granted KSU's motion for summary judgment. Nero appealed to the Court of Appeals. The case was transferred to this court, pursuant to K.S.A. 20-3018(c).

Nero claims the trial court erred in granting KSU's summary judgment motion because the court only partially analyzed whether KSU owed a duty of care to her. According to the plaintiff, KSU had a duty to protect her from Davenport's actions because of the university's "special relationship" with both Davenport and her and because she shared a landlord-tenant relationship with KSU.

> "In a negligence action, summary judgment is proper if the only questions presented are questions of law. To recover for negligence, the plaintiff must prove the existence of a duty, breach of that duty, injury, and a causal connection between the duty breached and the injury suffered. Whether a duty exists is a question of law.

Whether the duty has been breached is a question of fact." *Honeycutt v. City of Wichita,* 251 Kan. 451, Syl. P 8, 836 P.2d 1128 (1992).

The trial court, and this court on appeal, first must determine whether a duty exists. Without a duty, there can be no breach to support a plaintiff's claim. *Hackler v. U.S.D.* No. 500, 245 Kan. 295, 297, 777 P.2d 839 (1989).

In *Thies v. Cooper*, 243 Kan. 149, 151, 753 P.2d 1280 (1988), this court recognized:

> "It is the general rule that an actor has no duty to control the conduct of a third person to prevent that person from causing harm to others unless a 'special relationship' exists between the actor and the third party or the actor and the injured party. *Restatement (Second) of Torts* § 315 (1963)."

As far back as 1983, this court, speaking through Justice McFarland, stated:

> Although this court has never formally adopted... § 315,...we discussed the concept of special relationship in *Robertson v. City of Topeka*, 231 Kan. 358, 644 P.2d 458 (1982)....We observed a special relationship or specific duty has been found when one creates a foreseeable peril, not readily discoverable, and fails to warn. 231 Kan. at 364. *Durflinger v. Artiles*, 234 Kan. 484, 499, 673 P.2d 86 (1983).

The *Restatement (Second) of Torts* § 315 (1964), provides:

> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection."

Comment c to § 315 explains:

> "The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316-319. The relations between the actor and the other which require the actor to control the conduct of the third persons for the protection of the other are stated in §§ 314A and 320."
>
> "A special relationship may exist between parent and child, master and servant, the possessor of land and licensees, persons in charge of one with dangerous propensities, and persons with custody of another. *Restatement (Second) of Torts* §§ 316-320 (1964)." McGee, 248 Kan. at 438.

Although *Nero* never explicitly argued the distinctive nature of the university-student relationship imposed a duty of care upon KSU, our discussion commences with this argument because the converse view formed the basis of the trial court's grant of summary judgment in favor of KSU. The trial court ruled the university-student relationship in and of itself was not a special relationship within the meaning of § 315 and, upon that basis, refused to impose a duty upon KSU to protect Nero from Davenport's actions. The court reasoned that a plaintiff cannot predicate a university's liability on "the outmoded doctrine of *in loco parentis*" and that in general universities today "have no legal duty to shield their students from the dangerous activities of other students." Finding no Kansas cases on point, the trial court relied upon cases from other jurisdictions. See *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), cert. denied 446 U.S. 909 (1980); *Tanja H. v. Regents of the University of California*, 228 Cal. App. 3d 434, 278 Cal. Rptr. 918 (1991); *Crow v. State of California*, 222 Cal. App. 3d 192, 271 Cal. Rptr. 349 (1990); *Baldwin v. Zoradi*, 123 Cal. App. 3d 275, 176 Cal. Rptr. 809 (1981); *Eiseman v. State of New York*, 70 N.Y.2d 175, 518 N.Y.S.2d 608, 511 N.E.2d 1128 (1987). With regard to the doctrine of *in loco parentis*, the weight of authority is in agreement with the trial court's ruling. See *Furek v. University of Delaware*, 594 A.2d 506, 519-20 (Del. 1991). For a general discussion of the *in loco parentis* doctrine, see Szablewicz & Gibbs, "Colleges' Increasing Exposure to Liability: The New *In Loco Parentis*," 16 *J. L. & Educ*. 453 (1987); Note, "The Doctrine of *In Loco Parentis*, Tort Liability and the Student-College Relationship," 65 *Ind. L.J* 471, 472 (1990).

The trial court found no Kansas cases that considered "whether colleges and universities have a duty to protect students living in their residence halls from sexual assaults by other students living in the halls" or "whether colleges and universities have a duty to warn other students when an individual living in its residence halls has been charged with sexual assault or any other crime." None of the cases the trial court cited are exactly on point, and all can be distinguished factually. The same can be said for the cases *Nero* cites.

[The court then discusses several cases related to institutional liability for injuries to students. These opinions refused to find institutions liable because the injuries were not foreseeable. These cases are discussed in *LHE* secs. 2.3.1. and 4.17.2.]

* * * *

Nero cites two cases in which courts have held that liability may be imposed upon a university based, at least in part, upon the distinctive university-student relationship. See *Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991); *Mullins v. Pine Manor College*, 389 Mass. 47, 449 N.E.2d 331 (1983).

[*Furek* is discussed in *LHE*, § 4.12.2., pp. 536-537; *Mullins* is discussed in *LHE*, § 4.17.2., pp. 584-585.]

* * * *

We hold the university-student relationship does not in and of itself impose a duty upon universities to protect students from the actions of fellow students or third parties. The *in loco parentis* doctrine is outmoded and inconsistent with the reality of contemporary collegiate life.

There are, however, other theories under which a university might be held liable. See, e.g., Note, "The Liability and Responsibility of Institutions of Higher Education for the On-Campus Victimization of Students," 16 *J.C. & U.L.* 119, 123-30 (1989). See generally Bazyler, "The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack," 21 *Ariz. L. Rev.* 727, 745 (1979); Browder, "The Taming of a Duty--The Tort Liability of Landlords," 32 *Def. L.J.* 497, 500, 540-50 (1983); Selvin, "Landlord Tort Liability for Criminal Attacks on Tenants: Developments Since Kline," 9 *Real Estate L.J.* 311 (1981); Note, "Expanding the Scope of the Implied Warranty of Habitability: A Landlord's Duty to Protect Tenants from Foreseeable Criminal Activity," 33 *Vand. L. Rev.* 1493, 1503-07 (1980); "Annot.," 1 *A.L.R.*4th 1099 (discussion of a university's liability for failure to protect a student from crime); "Annot.," 43 *A.L.R.*3d 331, 348-53 (discussion of a landlord's duty to protect against crime).

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Nero raises other theories. She initially claims the trial court erred in not addressing whether the evidence established a special relationship, other than one based upon the doctrine of in loco parentis, between KSU and Davenport or between KSU and herself.

The plaintiff focuses upon the relationship between KSU and Davenport. She claims KSU took charge of Davenport and was under a duty to exercise reasonable care to control him and prevent him from physically harming others because the university knew or should have known he was likely to cause such harm. The legal basis for her argument is *Restatement (Second) of Torts* §§ 315(a), 319 (1964).

Under § 315(a), a special relationship must exist between KSU and Davenport that imposes a duty upon KSU to control Davenport's conduct....Nero alleges that special relationship is based upon § 319, the duty of those in charge of a person having dangerous propensities. The fact that KSU changed Davenport's residence hall assignment, with his agreement, because of the rape accusation does not mean the university was "in charge" or "took charge" of Davenport within the meaning of § 319. This is exemplified by the illustrations following that section. One illustration involves a private hospital for contagious diseases permitting a patient who has infectious scarlet fever to leave the hospital with the assurance he is recovered and the hospital negligently allowing another infectious patient to escape. The other illustration concerns a private sanitarium for the insane negligently allowing a homicidal maniac to escape.

Cases in which this court has applied § 319 typically have involved prisoners. See *Cansler*, 234 Kan. 554, Syl. PP 2, 3 (the State has a duty to confine inmates securely and, if inmates escape, to notify area residents and area law enforcement); *Washington*, 17 Kan. App. 2d 518, Syl. P 2 ("Prison officials owe a duty of ordinary or reasonable care to safeguard a prisoner in their custody or control from attack by other prisoners."). *C.J.W. v. State*, 253 Kan. 1, 853 P.2d 4 (1993), involved the alleged assault and sexual molestation of a 12-year-old child by a 17-year-old bully, both of whom were in the custody of juvenile officials at the time of the alleged attack. SRS was aware of the older child's "history of violent and sexually deviant acts." 253 Kan. at 12. This court applied §§ 315, 319, and 321 of the *Restatement*, holding the State had a duty to warn the juvenile officials of the older child's propensity toward violence and to protect children who are taken into custody from others, including other children, in custody. In *Beck v. Kansas Adult Authority*, 241 Kan. 13, 735 P.2d 222 (1987), Bradley Boan, "a disturbed former prisoner...and a former mental patient," walked into the emergency room at the KU Medical Center and fired three shots, killing two people. This court held that the Medical Center did not have a common-law duty to warn because "the Medical Center did not take charge of Boan and did not have custody or control over him at any time after his release from the penitentiary or at the time he entered the Medical Center with shotgun in hand." 241 Kan. at 23. Here, KSU did not have the type of control or custody over Davenport contemplated by § 315.

The trial court found *Nero*'s reliance upon *Cansler v. State*, 234 Kan. 554, misplaced in that "the duty of those in charge of persons with dangerous propensities has no application to the University residence hall setting." KSU urges this court to agree, stating the relationship between a university and its students is not analogous to the relationship between a prison and its inmates.

We believe the issue before us to be more basic. The trial court granted summary judgment. The law concerning the granting of summary judgment is well defined and has been stated in hundreds of cases; thus, we need not set it forth again. KSU is a landlord furnishing housing to its students in competition with private landlords. It owes a duty of reasonable care to its tenants. KSU has discretion whether to furnish housing to students. Once that discretionary decision is made, the university has a duty to use reasonable care to protect its tenants. Generally, whether a landlord has breached the duty of reasonable care to a tenant is a question of fact.

"Whether risk of harm is reasonably foreseeable is a question to be determined the trier of fact. Only when reasonable persons could arrive at but one conclusion may the court determine the question as a matter of law. [Citation omitted.]" *Kansas State Bank & Tr. Co. v. Specialized Transportation Services, Inc.*, 249 Kan. 348, 362, 819 P.2d 587 (1991).

"A proprietor of an inn, tavern, restaurant, or like business is liable for an assault upon a guest or patron by another guest or third party where the proprietor has reason to anticipate such an assault and fails to exercise reasonable care to forestall or prevent the same."

"The duty of a proprietor of a tavern or inn to protect his patrons from injury does not arise until the impending danger becomes apparent to him, or the circumstances are such that a careful and prudent person would be put on notice of the potential danger." *Gould v. Taco Bell*, 239 Kan. 564, Syl. PP 1, 3, 722 P.2d 511 (1966).

Other jurisdictions have applied the landowner-invitee analysis to determine whether a university has a duty to protect students from the criminal actions of third parties. See *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193 (1984); *Furek v. University of Delaware*, 594 A.2d 506, 520-21 (Del. 1991); *Relyea v. State*, 385 So. 2d 1378 (Fla. Dist. App. 1980), disapproved on other grounds *Avallone v. Bd. of County Com'rs Citrus Cty.*, 493 So. 2d 1002 (Fla. 1986); *Setrin v. Glassboro State College*, 136 N.J. Super. 329, 346 A.2d 102 (1975); *Brown v. N.C. Wesleyan College*, 65 N.C. App. 579, 309 S.E.2d 701 (1983). In analyzing the issue, all but the *Relyea* court relied upon *Restatement (Second) of Torts* § 344 (1964) which provides:

> "A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it."

The general rule is that a landowner has no duty to protect an invitee on the landowner's premises from a third party's criminal attack unless the attack is reasonably foreseeable. Prior similar acts committed upon invitees furnish actual or constructive notice to a landowner. *Relyea*, 385 So. 2d at 1382-83. A university owes student tenants the same duty to exercise due care for their protection as a private landowner owes its tenants. See *Peterson*, 36 Cal. 3d at 807.

We emphasize that a university is not an insurer of the safety of its students. Nonetheless, a university has a duty of reasonable care to protect a student against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably foreseeable and within the university's control.

Here, KSU knew of the alleged rape and had taken reasonable steps under the circumstances--i.e., it removed Davenport from the coed dormitory and moved him across campus and into an all-male dormitory. The university requested that Davenport stay away from the coed dorm and the food service building. School was ending, and Davenport was allowed to finish the semester.

When Davenport enrolled for intersession, KSU had the option of refusing to rent space to him. Instead, the university placed him in a coed dorm with the plaintiff, who is from a different state and presumably had no knowledge of the pending rape charge against Davenport. Nero knew Davenport was a fellow student living in the same dormitory, which may have given her a false sense of security. She ended up alone with Davenport in a public area. Had Davenport been a stranger and not living in the same dormitory, Nero might have been more likely to protect herself by immediately leaving the area.

We are of the opinion reasonable people would disagree whether Davenport's attack on Nero was foreseeable. Thus, that issue must be resolved by the trier of facts, and the trial court erred in granting summary judgment.

* * * *

[The University argued that it was immune from liability under the discretionary function exception to the Kansas Tort Claims Act.]

We conclude that KSU exercised its discretion to build, maintain, and operate housing units. Once that discretionary decision was made, KSU had a legal duty to use reasonable care under the circumstances in protecting the occupants of the coed housing unit from foreseeable criminal conduct while in a common area. A factual issue remains whether KSU used reasonable care in carrying out its legal duty to Shana Nero when it placed Ramon Davenport in a coed housing unit with her. A question also exists concerning a failure to warn her and a failure to institute adequate security measures to protect female students in the same housing unit based upon KSU's knowledge of the reported sexual attack by Ramon Davenport some three weeks earlier. Whether the second attack was foreseeable by KSU and whether KSU took adequate steps under the circumstances to prevent the second attack are questions of fact, and the trial court erred in granting summary judgment.

Reversed and remanded for trial.

Notes and Questions

1. The *Nero* court looks to *Bradshaw* and its progeny (*LHE* § 2.3.1. and Part II (B) of this *Supplement* (under sec. 2.3.1.))for guidance on whether to resurrect the *in loco parentis* doctrine. Why does the court reject *Nero*'s argument that a special relationship exists between the university and its students, requiring the university to protect her from physical assault?

2. Compare the *Nero* opinion with the outcome and reasoning in *Mullins v. Pine Manor*, sec. 4.17.2. of *LHE* pp. 584-585. Which is the better reasoned opinion, in your judgment? What

implications does each theory have for the way that colleges and universities design their residence halls? Implement security systems? Train residence hall staff? Monitor student conduct?

3. The court notes, in its recitation of the facts in *Nero*, that the university had not prosecuted the accused rapist under its student code of conduct because criminal charges were pending. Does this decision of the university have any bearing on its potential liability to Ms. Nero, since there had been no finding of guilt or innocence? For a brief discussion of the issues involved when a student concurrently violates a criminal law and also violates the institution's code of student conduct, see *LHE*, § 4.5.3., pp. 460-462.

4. If a nonstudent who was on the campus for a lawful purpose were assaulted by a student who the university knew had engaged in similar behavior before, would the analysis in *Nero* apply, or is it limited to situations in which the university is a landlord?

SECS. 4.14.1. & 4.17.2. Housing Regulations and *Protection Against Violent Crime on Campus.*

Problem 14

Richard Ropes is a 30-year-old sophomore at Green College, a private, four-year liberal arts college. Ropes is living in a coed residence hall on campus. College administrators were informed, at the time of Ropes' matriculation, that he had served six years in prison for assault and drug charges. Until last Saturday, however, he has not caused a problem for the residence hall staff or for anyone else, for that matter. Underage drinking is common in the residence hall, but there is no indication that Ropes has been involved in any of the drinking. Green College has a policy against underage drinking anywhere on campus but enforces it only outside the residence halls.

After a big soccer match last Saturday, several residents of Ropes' residence hall invited him to a party. Ropes brought five six-packs of beer, as did several of the other sophomores, all of whom were under 21. During the party, a dispute developed over one of the plays in the soccer match. One of the younger students shouted at Ropes and taunted him, calling him "old man." Ropes responded by striking the student in the face several times, causing severe facial injuries and permanent disfigurement.

The injured student's parents have sued Green College, its trustees, the president, the vice president for student affairs, and the residence hall advisor, a 23-year-old graduate student. They argue that the college should have advised all occupants of the residence hall that Ropes was an ex-felon, and that allowing Ropes to live with "young, impressionable students" was inappropriate and evidence of gross negligence.

Please advise the president and trustees of the likelihood of these parents prevailing in court. Also, please discuss any revisions that Green College might wish to make in its policies with regard to residence halls or student conduct.

E.

CHAPTER V: THE COLLEGE AND THE COMMUNITY

SEC. 5.6.3. Trespass Statutes and Ordinances.

State v. Schmid
SUPREME COURT OF NEW JERSEY
84 N.J. 535; 423 A.2d 615
1980

OPINION: The opinion of the Court was delivered by HANDLER, J.

While distributing political literature on the campus of Princeton University, defendant Chris Schmid, a member of the United States Labor Party, was arrested and charged by the University with trespass upon private property. He was subsequently convicted under the State's penal trespass statute. On this appeal he challenges the conviction on the grounds that it stems from a violation of his federal and state constitutional rights to freedom of speech and assembly.

I

On April 5, 1978, Chris Schmid was distributing and selling political materials on the main campus of Princeton University, a private, non-profit institution of higher education located in the Borough of Princeton, New Jersey. These materials dealt with the City of Newark mayoral campaign and with the United States Labor Party in general. Schmid was not a student at Princeton University nor was the Labor Party a university affiliated or campus based organization. On certain previous occasions members of the Labor Party had unsuccessfully sought to obtain University permission to distribute and sell political materials on campus. On this particular occasion in April 1978, however, no such permission was either sought or received.

Under the University regulations then in effect, permission was a prerequisite for the on campus distribution of materials by off-campus organizations. No such permission was required, however, for the same activity by a university affiliated organization or by Princeton students. The regulatory language pertaining to off campus organizations stated in part:

> Demonstrations and the distribution of leaflets, statements, or petitions...are permitted on the campus unless, or until, they disrupt regular essential operations of the University or significantly infringe on the rights of others. On the same grounds, the campus is open to speakers whom students, faculty, or staff wish to hear, and to recruiters for agencies and organizations in whom students or faculty have an interest. [University Regulations as passed by the Council of the Princeton University Community, May 1975, a amended 1976.] These regulations further provided that no solicitation of either sales or charitable contributions was to be permitted on campus without the express authorization of the appropriate University officials. Moreover, door to door political or charitable solicitation was generally prohibited. *Ibid.* The University revised these regulations in 1979.[2]

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[2] The revised regulations now read in pertinent part as follows.

REGULATIONS GOVERNING SOLICITATION (INCLUDING COMMERCIAL SALES, FUND-RAISING, AND DISTRIBUTION OF LITERATURE) BY OFF--CAMPUS INDIVIDUALS OR ORGANIZATIONS

No individual or organization may distribute literature, advertise, or otherwise solicit customers, seek donations, or make sales on campus without the express authorization of the Office of the Dean of Student Affairs.

COMMERCIAL SALES. The Office of the Dean of Student Affairs may grant permission for solicitations and sales by off-campus business concerns only when specifically requested to do so by a recognized University students [sic], faculty, or employee organization. Such permission, when granted, will be subject to such limitations as the Dean of Student Affairs may prescribe.

CHARITABLE, POLITICAL, OR RELIGIOUS SOLICITATION. As a general rule, representatives of off-campus political, religious, and charitable groups will not be permitted to solicit on campus. However, individuals acting on behalf of candidates for public office or of bona fide political or religious organizations may obtain permission to sell or distribute their political or religious literature under the following guidelines:

1. Non-members of the University community who are acting on behalf of candidates for public office or of bona fide political or religious organizations, and who wish to seek permission to distribute and/or sell political and religious literature on the campus should apply to the Office of the Dean of Student Affairs between the hours of 9:00 a.m. and 5:00

Schmid stipulated that he had been aware in April 1978 that the existing University policy was against allowing "persons not connected with the University to enter campus uninvited and without sponsorship for the purpose of soliciting support or contributions." He had, in fact, previously been told on February 15, 1978 that his presence and activity on campus without permission were "forbidden" and that he "was subject to arrest for trespassing if he entered on campus to solicit again

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p.m. Monday through Friday.

2. In choosing among the six sites where political and religious literature may be sold or distributed which were recommended by the Council of the Princeton University Community preference will be given to three locations: the area adjacent to the Student Center (on the Library side), the area surrounding Alexander Hall, and the area around the University Store.

3. Permission for the sale or distribution of political and religious literature may be granted only for the hours between 9:00 a.m. and 5:00 p.m. seven days a week.

4. The number of persons who, at any one time, will be permitted to sell or distribute literature for any particular candidate or group is limited to one or two at any given location, and to five or six on the campus as a whole.

5. The number of occasions on which candidates or groups will be permitted to sell or distribute literature will be limited normally to six visits during a given month. In special situations, such as an approaching election, more frequent visits may be permitted.

6. The total number of people distributing or selling literature at any one location on campus will be limited. When several groups wish to distribute literature at a particular location, in accordance with general University policy, preference in use of campus facilities will be given to members of the University community. In acting on requests from members of outside political or religious groups and representatives of candidates, individuals who are sponsored by members of the University community will be preferred.

7. Harassment of members of the University community by those selling or distributing literature, or sale or distribution outside of the hours or locations for which permission has been granted, will be cause for the immediate revocation of permission for the sale or distribution of literature by those involved.

8. Decisions regarding requests under these guidelines will need to take into account both any special circumstances that may relate to University activities and the burden that permission to sell or distribute political or religious literature may place on the University's security forces and administrative staffs. [University Regulations as passed by the Council of the Princeton University Community, May 1975, as amended 1979.]

[without University permission]."

Schmid was arrested for trespass on University property on the day in question by a member of the Princeton University Security Department and charged as a disorderly person under N.J.S.A. 2A:170-31.[3] He was convicted of trespass in Princeton Borough Municipal Court on October 20, 1978 and fined $15 plus $10 costs. On February 20, 1979, following a trial de nova in Superior Court, Law Division, pursuant to R. 3:28 8, Schmid was again found guilty of trespass and the same monetary penalty was reimposed. While defendant's appeal was pending in the Appellate Division, this Court directly certified the case under R. 2:12-1. 81 N.J. 344 (1979). At the Court's invitation, Princeton University intervened in this appeal. The Association of Independent Colleges and Universities in New Jersey also filed an amicus curiae brief with this Court.

Defendant contends on this appeal that his trespass conviction offends both the federal and the State Constitutions. He specifically asserts that his conduct distributing political literature on the main campus of Princeton University constituted an exercise of his freedoms of speech and assembly, an exercise protected both by the First Amendment to the United States Constitution and by Article I, paragraphs 6 and 18 of the New Jersey Constitution; he maintains that the University was thus constitutionally obligated to permit this activity on its campus. In opposition, the State and the University contend that defendant's conduct encroached unlawfully upon legitimate and protectable private property rights. They argue that the University as a private entity had not undertaken state governmental action and had not invited or made a public use of its property sufficient to subject it to the strictures of the speech and assembly guarantees under either the federal or the State constitution. For these reasons, they urge that the University, in prosecuting Schmid for trespass upon private property, did not violate his individual constitutional rights.

We now address the respective federal and State constitutional issues framed by this appeal.

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[3] That statute provided in pertinent part that any person who trespasses on any lands...after being forbidden so to trespass by the owner, occupant, lessee or licensee thereof, or after public notice on the part of the owner, occupant, lessee or licensee forbidding such trespassing, which notice has been conspicuously posted adjacent to a usual entry way thereto, is a disorderly person and shall be punished by a fine of not more than $50. [N.J.S.A. 2A:170-31.] The offense covered by that statute, repealed by L. 1978, c. 95, § 2C:98-2 (effective September 1, 1979), is now contained in the New Jersey Code of Criminal Justice as N.J.S.A. 26:18-3 (L. 1978, c. 95, § 2C:18-3, effective September 1, 1979). The correct statute to be applied here, of course, is N.J.S.A. 2A:170-31, which was in effect at the time of the alleged offense. See N.J.S.A. 2C:1-1(b).

II

* * * *

III

Defendant asserts that under the State Constitution he is afforded protection of his expressional rights even if it is not clear that the First Amendment would serve to grant that protection. The United States Supreme Court has recently acknowledged in the most clear and unmistakable terms that a state's organic and general law can independently furnish a basis for protecting individual rights of speech and assembly. *PruneYard Shopping Center v. Robins, supra*, 447 U.S. at 80-81, 100 S. Ct. at 2040, 64 L.Ed.2d at 752. The view that state constitutions exist as a cognate source of individual freedoms and that state constitutional guarantees of these rights may indeed surpass the guarantees of the federal Constitution has received frequent judicial expression.

* * * *

On numerous occasions our own courts have recognized the New Jersey Constitution to he an alternative and independent source of individual rights. See, e. g., *Smith v. Penta*, 81 N.J. 65, 73-76, 405 A.2d 350 (1979); *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 177, 330 A.2d 1 (1974); *id.* at 193-194 (Pashman, J., dissenting). Mr. Justice Brennan in his oft-cited piece in 90 *Harv.L.Rev., supra*, at 499 drew support for this proposition from *State v. Johnson*, 68 N.J. 349, 353, 346 A.2d 66 n.2 (1975), wherein Justice Sullivan had observed that although the New Jersey constitutional provision relating to searches and seizures was identical to the federal Fourth Amendment provisions, "'we have the right to construe our State constitutional provision in accordance with what we conceive to be its plain meaning.'"

The guarantees of our State Constitution have been found to extend to a panoply of rights deemed to be most essential to both the quality of individual life and the preservation of personal liberty. See, e. g., *Levine v. Institutions & Agencies Dept. of N. J.*, 84 N.J. 234, 244-249, 258, 418 A.2d 229 (1980) (right to an education); *id.* at 273 (Pashman, J., dissenting); *State v. Ercolano*, 79 N.J. 25, 30, 34, 397 A.2d 1062 (1979) (privacy based freedom from "unreasonable searches and seizures"); *State v. Slockbower*, 79 N.J. 1, 4, 397 A.2d 1050 n.2 (1979) (same); *State v. Tropea*, 78 N.J. 309, 313, 394 A.2d 355, n.2 (1978) (double jeopardy and fundamental fairness); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 79, 389 A.2d 465 (1978) (equal protection); *State v.*

Saunders, 75 N.J. 200, 216-217, 381 A.2d 333 (1977) (right of sexual privacy); *id.* at 224-225 (Schreiber, J., concurring); In re *Quinlan*, 70 N.J. 10, 19, 40-41, 51, 355 A.2d 647 (1976), cert. den. sub nom. *Garger v. New Jersey*, 429 U.S. 922, 97 S. Ct. 319, 50 L.Ed.2d 289 (1976) (right of choice to terminate life support systems as aspect of right of privacy); *State v. Johnson, supra*, 68 N.J. at 353 (freedom from "unreasonable searches and seizures"); *State v. Gregory*, 66 N.J. 510, 513-514, 333 A.2d 257 (1975) (double jeopardy and fundamental fairness); *Robinson v. Cahill*, 62 N.J. 473, 482, 509, 303 A.2d 273 (1973), cert. den. sub nom. *Dickey v. Robinson*, 414 U.S. 976, 94 S. Ct. 292, 38 L.Ed.2d 219 (1973) (*Robinson I*) (right to an education); *Worden v. Mercer County Bd. of Elections*, 61 N.J. 325, 345-346, 294 A.2d 233 (1972) (right to vote); *Cooper v. Nutley Sun Printing Co.*, 36 N.J. 189, 191, 195-196, 175 A.2d 639 (1961) (right of employees to organize and bargain collectively); *State v. Hannah*, 171 N.J.Super. 325, 330, 408 A.2d 1349 (App.Div.1979) (right to a public criminal trial inheres in the public); *Freedman v. New Jersey State Police*, 135 N.J. Super. 297, 300-301, 343 A.2d 148 (Law Div.1975) (freedom of the press); *Gray v. Serruto Builders, Inc.*, 110 N.J.Super. 297, 306-307, 265 A.2d 404 (Ch.Div.1970) (right to be free from racial discrimination); cf. *State v. Carpentieri*, 82 N.J. 546, 572-573, 414 A.2d 966 (1980) (Pashman, J., dissenting) (freedom from "unreasonable searches and seizures"). *Contra, Anderson v. Sills*, 143 N.J.Super. 432, 442, 363 A.2d 381 (Ch.Div.1976). As Justice Schreiber pointed out in his concurring opinion in *State v. Saunders, supra*, with respect to fundamental personal rights, "individuals have freedom to think, decide and act as they see fit; this freedom is an aspect of their right of privacy" guaranteed by the New Jersey Constitution, N.J.Const. (1947), Art. I, par. 1, quite apart from the federal Constitution. 75 N.J. at 225.

Most recently, this Court recognized through Chief Justice Wilentz that freedom of the press, intimately associated with individual expressional and associational rights, is strongly protected under the State Constitution (N.J.Const. (1947), Art. I, par. 6), state statutory enactments (e. g., N.J.S.A. 2A:84A 21 et seq. ("shield law")), and state decisional law. *See State v. Boiardo*, 83 N.J. 350, 353, 416 A.2d 793 (1980) (*Boiardo II*); *State v. Boiardo*, 82 N.J. 446, 458, 414 A.2d 14 (1980) (*Boiardo I*); In re *Farber*, 78 N.J. 259, 286-287, 394 A.2d 330 (Pashman, J., dissenting). The United States Supreme Court itself has acknowledged that the First Amendment, which implicates this important freedom, does not accord to it the degree of protection that may be available through state law. *Branzburg v. Hayes*, 408 U.S. 665, 706, 92 S. Ct. 2646, 2669, 33 L.Ed.2d 626, 654 (1972); see also, e. g., *Keene Publishing Corp. v. Cheshire County Superior Court, supra; Westchester Rockland Newspapers, Inc. v. Leggett, supra.*

A basis for finding exceptional vitality in the New Jersey Constitution with respect to individual rights of speech and assembly is found in part in the language employed. Our Constitution affirmatively recognizes these freedoms, viz:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press....[N.J.Const. (1947), Art. I, par. 6.]

> The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances. [N.J.Const. (1947), Art. I, par. 18.]

The constitutional pronouncements, more sweeping in scope than the language of the First Amendment,[8] were incorporated into the organic law of this State with the adoption of the 1844 Constitution. N.J.Const. (1844), Art. I, pars. 5 and 18. They were, however, directly derived from earlier sources, e. g., the free speech provision was modeled after Article 7, Section 8 of the 1821 Constitution of the State of New York (now N.Y. Const. (1938), Art. § 8). Heckel, *The Bill of Rights*. (Monograph), in 2 *Proceedings of the New Jersey Constitutional Convention of 1947*, 1336, 1344 (1951) (hereinafter Heckel, *Bill of Rights*); *id.* at 1357-1358. This early constitutional model itself has been recognized as constituting an independent source of protectable individual rights. See *Cooper v. Morin, supra*, 49 N.Y.2d at 79, 399 N.E.2d at 1194, 424 N.Y.S.2d at 174; *Westchester Rockland Newspapers, Inc. v. Leggett, supra*, 48 N.Y.2d at 436, 442, 399 N.E.2d at 521, 525, 423

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[8] Even if the language of the state constitutional and federal constitutional provisions were identical, this Court could give differing interpretations to the provisions. This option was noted by Justice Sullivan in *State v. Johnson*, 68 N.J. 349, 353, 346 A.2d 66 (1975). As Justice Mosk of the California Supreme Court has observed, "it is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse." *People v. Brisendine*, 13 Cal.3d 528, 550, 531 P.2d 1099, 1113, 119 Cal.Rptr. 315, 329 (Sup.Ct. 1975), see Note, "Expanding State Constitutional Protections and the New Silver Platter: After They've Shut the Door, Can They Bar the Window?", 8 *Loyola U.L.J.* 186, 192 (1976); see also Z. Chafee, *Free Speech in the United States* 5-6 (1941).

N.Y.S.2d at 634, 638; *Sharrock v. Dell Buick Cadillac, Inc., supra*, 45 N.Y.2d at 160-161, 379 N.E.2d at 1173, 408 N.Y.S.2d at 43-44.

Although our own courts have seldom been invited or required to view the New Jersey constitution as a separate basis for delineating the scope of individual speech and assembly freedoms, the philosophy recognizing the importance of such rights has been frequently voiced. In a case decided last term dealing with such expressional rights in the context of municipal zoning restrictions, Justice Clifford observed as follows:

> Political speech...occupies a preferred position in our system of constitutionally-protected interests. [*State v. Miller*, 83 N.J. 402, 411, 416 A.2d 821 (1980).] Where political speech is involved, our tradition insists that government "allow the widest room for discussion, the narrowest range for its restriction." [*Id.* at 412 (citation omitted).]

See *Adams Theatre Co. v. Keenan*, 12 N.J. 267, 277, 96 A.2d 519 (1953) (under the facts, there was a First Amendment violation in the denial of theatre license since "speech[, including the "performance of a play or show" (*id.* at 270),] is to be presumed to be protected speech and...the presumption is not the other way"); *State v. Butterworth*, 104 N.J.L. 579, 582, 142 A. 57 (E. & A.1928) (in overturning the unlawful assembly convictions of striking workers, Court observed that "these constitutional mandates [the First Amendment and N.J.Const. (1844), Art. I, par. 18], being in favor of the liberty of the people, must be given the most liberal and comprehensive construction").

Our courts have also on occasion observed that the State Constitution serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. *Smith v. Penta, supra*, 81 N.J. at 74; *Gangemi v. Berry*, 25 N.J. 1, 8-9, 134 A.2d 1 (1957). Hence, the explicit affirmation of these fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction upon them. See 16A Am.Jur.2d, *Constitutional Law*, § 439 at 208 (1979). It has been recognized that the State Constitution, as a wellspring of individual rights and liberties, may be directly enforceable, its protections not dependent even upon implementing legislation. *Peper v. Princeton Univ. Bd. of Trustees, supra*, 77 N.J. at 76-77. "Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence...."*King v. South Jersey Nat'l Bank, supra*, 66 N.J. at 177 (Hughes, C. J.); see *Robinson I, supra*, 62 N.J. at 513; *Booker v. Plainfield Bd. of Educ.*, 45 N.J. 161, 212 A.2d 1, 173-175 (1965). Furthermore, the State Constitution imposes upon the State government an affirmative obligation to protect fundamental individual rights. See In re *Quinlan, supra*, 70 N.J. at 19 n.1; cf. *Mt. Laurel v.*

Public Advocate of N. J., 83 N.J. 522, 535-536, 416 A.2d 886 (1980) (state statute creating Office of Public Advocate to enforce the rights of citizens as an aspect of the public interest is not unconstitutional). This constitutional imperative, applicable to the freedoms of speech and assembly, comports with the presumed intent of those who framed our present Constitution. See Heckel, *Bill of Rights, supra* at 1344-1345, 1357-1358.

Finally, the rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well. It has been noted that in our interpretation of fundamental State constitutional rights, there are no constraints arising out of principles of federalism.[9] *Robinson I, supra*, 62 N.J. at 490. See also *King v. South Jersey Nat'l Bank, supra*, 66 N.J. at 192-193 (Pashman, J., dissenting) (citing *Cooper v. Nutley Sun Printing Co., supra*, 36 N.J. at 196-197; *Gray v. Serruto Builders, Inc., supra*, 110 N.J.Super. at 306-307; Countryman, "The Role of a Bill of Rights in a Modern State Constitution," *supra*, 45 *Wash.L.Rev.* at 473; Project Report, "Toward an Activist Role for State Bills of Rights," supra, 8 *Harv.C.R.-C.L.L.Rev.* at 338 (analyzing N.J.Const. (1947), Art. I, par. 6)). Hence, federal requirements concerning "state action," founded primarily in the language of the Fourteenth Amendment and in principles of federal state relations, do not have the same force when applied to state based constitutional rights.

It is also clear that while state constitutions may be distinct repositories of fundamental rights independent of the federal Constitution, there nonetheless exist meaningful parallels between the federal Constitution and state constitutions, especially in the areas where constitutional values are shared, such as speech and assembly. Indicative of such mutuality, our State Constitution not only affirmatively guarantees to individuals the rights of speech and assembly, but also expressly prohibits government itself, in a manner analogous to the federal First and Fourteenth Amendments, from unlawfully restraining or abridging "the liberty of speech." N.J.Const. (1947), Art. I, par. 6.

We conclude, therefore, that the State Constitution furnishes to individuals the complementary freedoms of speech and assembly and protects the reasonable exercise of those rights. These guarantees extend directly to governmental entities as well as to persons exercising governmental powers. They are also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property. The State Constitution in this fashion serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals exercised under Article I, paragraphs 6 and 18 thereof.

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[9] This point was expressed in dissent by Justice Pashman who stated that "one of the most important functions performed by state constitutional bills of rights which is not performed by the federal constitution is the protection of citizens against private oppression as well as oppression by the state." *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 193, 330 A.2d 1 (1974) (Pashman, J. dissenting) (citations omitted).

Against this constitutional backdrop must be addressed the question of whether the State Constitution's guarantees of speech and assembly under Article I, paragraphs 6 and 18 apply to the distribution of political materials by defendant Schmid upon the Princeton University campus on April 5, 1978. This question brings us to the heart of the problem -- the need to balance within a constitutional framework legitimate interests in private property with individual freedoms of speech and assembly.

In the comparable federal setting, private property not used by the public or made available for public use does not ordinarily become subject directly to restrictions in favor of the public. *Hynes v. Oradell*, 425 U.S. 610, 619-620, 96 S. Ct. 1755, 1760, 48 L.Ed.2d 243, 252 (1976). Moreover, private property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd Corp. v. Tanner, supra*, 407 U.S. at 569, 92 S. Ct. at 2229, 33 L.Ed.2d at 143. See , 447 U.S. at 82, 100 S. Ct. at 2041, 64 L.Ed.2d at 752; *Hudgens v. NLRB, supra*, 424 U.S. at 519-520, 96 S. Ct. at 1036, 47 L.Ed.2d at 206-207. Nevertheless, as private property becomes, on a sliding scale, committed either more or less to public use and enjoyment, there is actuated, in effect, a counterbalancing between expressional and property rights. *Marsh v. Alabama, supra*, 326 U.S. at 506, 66 S. Ct. at 278, 90 L.Ed. at 268.

There is a parallel under our State Constitution. The state constitutional equipoise between expressional rights and property rights must be similarly gauged on a scale measuring the nature and extent of the public's use of such property. Thus, even as against the exercise of important rights of speech, assembly, petition and the like, private property itself remains protected under due process standards from untoward interference with or confiscatory restrictions upon its reasonable use. *Robins v. Prune Yard Shopping Center, supra*, 23 Cal.3d at 910-911, 592 P.2d at 347-348, 153 Cal.Rptr. at 860-861; see *King v. South Jersey Nat'l Bank, supra*, 66 N.J. at 175. The constitutional protection of private property against undue interference or "taking" is secured by our own Constitution. N.J.Const. (1947), Art. I, pars. 1 and 20.

On the other hand, it is also clear that private property may be subjected by the state, within constitutional bounds, to reasonable restrictions upon its use in order to serve the public welfare. See, e. g., *Vasquez v. Glassboro Service Ass'n*, 83 N.J. 86, 100-101, 415 A.2d 1156 (1980); *Garrow v. Elizabeth General Hosp. & Dispensary*, 79 N.J. 549, 560-561, 401 A.2d 533 (1979); *Doe v.*

Bridgeton Hosp. Ass'n, 71 N.J. 478, 487-488, 366 A.2d 641 (1976), cert. den., 433 U.S. 914, 97 S. Ct. 2987, 53 L.Ed.2d 1100 (1977); *State v. Shack*, 58 N.J. 297, 305-308, 277 A.2d 369 (1971); *Greisman v. Newcomb Hosp.*, 40 N.J. 389, 395-401, 192 A.2d 817 (1963); *Zelenka v. Benevolent & Protective Order of Elks*, 129 N.J.Super. 379, 386-387, 324 A.2d 35 (App.Div.1974), certif. den., 66 N.J. 317 (1974); cf. *State v. Miller, supra*, 83 N.J. at 415 (1980) (while "preservation of aesthetics and property values is a legitimate end for a municipal zoning ordinance," an ordinance generally prohibiting property owners from placing signs on their property violates the protected First Amendment interests of those property owners). In this regard, the United States Supreme Court has recently acknowledged that

> it is, of course, well-established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation....[*PruneYard Shopping Center v. Robins, supra*, 447 U.S. at 81, 100 S. Ct. at 2040-2041, 64 L.Ed. 2d at 752.]

The California Supreme Court, in the same case, found that such restrictions upon private property could properly be imposed in order to protect the rights of free speech and petition, viz:

> To protect free speech and petitioning is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights. [*Robins v. PruneYard Shopping Center, supra*, 23 Cal. 3d at 908, 592 P.2d at 346, 153 Cal.Rptr. at 859.]

We are thus constrained to achieve the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property. In seeking this optimum, we can derive some guidance from certain of the Supreme Court cases, such as *Marsh v. Alabama, supra; Lloyd Corp. v. Tanner supra*, and *PruneYard Shopping Center v. Robins, supra*, which recognize generally that the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property. Since it is our State Constitution which we are here expounding, it is also fitting that we look to our own strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to a public enjoyment of private property. See *Vasquez v. Glassboro Service Ass'n, supra*, 83 N.J. at 100-101; *State v. Shack*, *supra*, 58 N.J. at 305-308, *Zelenka v. Benevolent & Protective Order of Elks, supra*, 129 N.J.Super. at 386-387.

Accordingly, we now hold that under the State Constitution, the test to be applied to ascertain the parameters of the rights of speech and assembly upon privately owned property and the extent to which such property reasonably can he restricted to accommodate these rights involves several elements. This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. This is a multi-faceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.

Even when an owner of private property is constitutionally obligated under such a standard to honor speech and assembly rights of others, private property rights themselves must nonetheless be protected. The owner of such private property, therefore, is entitled to fashion reasonable rules to control the mode, opportunity and site for the individual exercise of expressional rights upon his property. It is at this level of analysis -- assessing the reasonableness of such restrictions -- that weight may be given to whether there exist convenient and feasible alternative means to individuals to engage in substantially the same expressional activity. While the presence of such alternatives will not eliminate the constitutional duty, it may lighten the obligations upon the private property owner to accommodate the expressional rights of others and may also serve to condition the content of any regulations governing the time, place, and manner for the exercise of such expressional rights.

Taken together, these are the relevant considerations which must be brought to bear in order to reach an ultimate determination in this case as to the constitutionality of Schmid's trespass conviction for attempting to exercise his rights of speech and assembly upon the Princeton University campus. The record in this appeal is to be assessed in light of the constitutional standard herein set forth.

IV

The application of the appropriate standard in this case must commence with an examination of the primary use of the private property, namely, the campus and facilities of Princeton University. Princeton University itself has furnished the answer to this inquiry in expansively expressing its overriding educational goals, viz: The central purposes of a University are the pursuit of truth, the discovery of new knowledge through scholarship and research, the teaching and general development of students, and the transmission of knowledge and learning to society at large. Free inquiry and free expression within the academic community are indispensable to the achievement of these goals. The freedom to teach and to learn depends upon the creation of appropriate conditions and opportunities on the campus as a whole as well as in classrooms and lecture halls. All members of the academic community share the responsibility for securing and sustaining the general conditions conducive to this freedom.

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Free Speech and peaceable assembly are basic requirements of the University as a center for free inquiry and the search for knowledge and insight....[University Regulations, *supra* (1975 as amended 1976).] No one questions that Princeton University has honored this grand ideal and has in fact dedicated its facilities and property to achieve the educational goals expounded in this compelling statement.

In examining next the extent and nature of a public invitation to use its property, we note that a public presence within Princeton University is entirely consonant with the University's expressed educational mission. Princeton University, as a private institution of higher education, clearly seeks to encourage both a wide and continuous exchange of opinions and ideas and to foster a policy of openness and freedom with respect to the use of its facilities. The commitment of its property, facilities, and resources to educational purposes contemplates substantial public involvement and participation in the academic life of the University. The University itself has endorsed the educational value of an open campus and the full exposure of the college community to the "outside world," i.e., the public at large. Princeton University has indeed invited such public uses of its resources in fulfillment of its broader educational ideals and objectives.[10]

The further question is whether the expressional activities undertaken by the defendant in this case are discordant in any sense with both the private and public uses of the campus and facilities of the University. There is nothing in the record to suggest that Schmid was evicted because the purpose of his activities, distributing political literature, offended the University's educational policies. The reasonable and normal inference thus to be extracted from the record in the instant case is that defendant's attempt to disseminate political material was not incompatible with either Princeton University's professed educational goals or the University's overall use of its property for educational purposes.[11] Further, there is no indication that even under the terms of the University's own regulations, Schmid's activities in any way, directly or demonstrably "disrupted the regular and essential operations of the University" or that in either the time, the place, or the manner of Schmid's distribution of the political materials, he "significantly infringed on the rights of others" or caused any interference or inconvenience with respect to the normal use of University property and the normal routine and activities of the college community.

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[10] Princeton University in its regulations has dealt extensively with "community use of University resources." Public participation in activities involving the use of University facilities may be by explicit invitation relating to "activities...[which] are an integral part of the University's function a an educational institution." by "implicit invitation" as to its grounds and walkways "generally available to the public," by "participation in University-sponsored or sanctioned programs," or by "private Invitation." If no other form of invitation is applicable. University Regulations, *supra* note 2 (1975, as amended 1976).

Without necessarily endorsing any of the foregoing conclusions, the University nevertheless contends that its solicitation regulation was properly invoked against Schmid in this case because it requires that there be a specific invitation from on-campus organizations or students and a specific official authorization before an individual may enter upon University premises even for the purpose of exercising constitutional rights of speech and assembly. It points out that Schmid failed to obtain such permission. The University stresses the necessity for and reasonableness of such a regulation.

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[11] Supportive of this conclusion is the following excerpt from Princeton University President William G. Bowen in "The Role of the University as an Institution in Confronting External Issues" (January 6, 1978):

> Central to the philosophy of education is the proposition that the University has a responsibility to expose students and faculty members to a wide variety of views on controversial questions....Put simply, the University's ability to carry out its basic educational mission requires an environment conducive to the maximum possible freedom of thought and expression for each individual student and faculty member. We are not talking here about something that is merely desirable; we are talking about something that is essential. In this crucial respect, the University has a special role in the society-a special responsibility for creating a milieu in which every individual, whether the steadiest proponent of the majority viewpoint or the loneliest dissenter, is encouraged to think independently.

As noted by Professor Emerson, "freedom of expression is [both] an essential process for advancing knowledge and discovering truth" and "a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus." T. Emerson, *The System of Freedom of Expression* 6, 7 (1970).

In addressing this argument, we must give substantial deference to the importance of institutional integrity and independence. Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well being of their communities of students, teachers and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in controlling those who seek to enter its domain. The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions. See, e. g., *Healy v. James, supra*, 408 U.S. at 180, 92 S. Ct. at 2345, 33 L.Ed.2d at 279; *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 513-514, 89 S. Ct. 733, 740-741, 21 L.Ed.2d 731, 741-742 (1969).[12] Hence, private colleges and universities must be accorded a generous measure of autonomy and self governance if they are to fulfill their paramount role as vehicles of education and enlightenment.

In this case, however, the University regulations that were applied to Schmid (in contrast to those subsequently adopted, *supra* at 539-541 n.2) contained no standards, aside from the requirement for invitation and permission, for governing the actual exercise of expressional freedom. Indeed, there were no standards extant regulating the granting or withholding of such authorization, nor did the regulations deal adequately with the time, place, or manner for individuals to exercise their rights of speech and assembly. Regulations thus devoid of reasonable standards designed to protect both the legitimate interests if the University as an institution of higher education and the individual exercise of expressional freedom cannot constitutionally be invoked to prohibit the otherwise noninjurious and reasonable exercise of such freedoms. Cf. *Tinker v. Des Moines Indep. Community School Dist., supra*, 393 U.S. at 513, 89 S. Ct. at 740, 21 L.Ed.2d at 741 (exercise of right of free speech on public school grounds must not interfere with educational mission of the institution); *Cox v. Louisiana*, 379 U.S. 536, 556-558, 85 S. Ct. 453, 465-466, 13 L.Ed.2d 471, 485-486 (1965) (vague statutes cannot be used to prosecute persons for exercising their First Amendment rights);

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[12] The public's right to exercise its freedom of speech does not mandate unrestricted access to university facilities. Even with respect to public property, the public's use of that property for First Amendment activity may be restricted, if not actually prohibited. See. e. g., *Adderleym v. Florida*, 385 U.S. 39, 47, 87 S. Ct. 242, 247, 17 L.Ed.2d 149, 155-156 (1966) (public may be prohibited from demonstrating on the grounds of county jail); *American Future Systems, Inc. v. Pennsylvania State Univ.*, 618 F.2d 252, 255 (3 Cir. 1980) (state university regulation forbidding sales demonstrations and solicitation in university-owned and operated residence halls is constitutional); *Wolin v. Port of New York Auth.*, 392 F.2d 83, 94 (2 Cir. 1968). cert. den., 393 U.S. 940, 89 S. Ct. 290, 21 L.Ed.2d 275 (1968) (regulations may limit public's use of public property for expressional activity to ensure that that activity does not interfere with the use to which the property is dedicated).

Wolin v. Port of New York Auth., 392 F.2d 83, 93-94 (2 Cir. 1968), cert. den., 393 U.S. 940, 89 S. Ct. 290, 21 L.Ed.2d 275 (1968) (public authority may issue reasonable regulations for use of bus terminal for public demonstrations; such regulations should balance right of free expression with public right to use terminal for transportation purposes). In these circumstances, given the absence of adequate reasonable regulations, the required accommodation of Schmid's expressional and associational rights, otherwise reasonably exercised, would not constitute an unconstitutional abridgment of Princeton University's property rights. See *PruneYard Shopping Center v. Robins, supra*, 447 U.S. at 82-84, 100 S. Ct. at 2041-2042, 64 L.Ed.2d at 753 (absent any regulations governing expressional activity, such activity reasonably exercised on private property devoted to public use is protectable under state constitution and does not constitute impermissible infringement upon private property rights). It follows that in the absence of a reasonable regulatory scheme, Princeton University did in fact violate defendant's State constitutional rights of expression in evicting him and securing his arrest for distributing political literature upon its campus.

We are mindful that Princeton University's regulatory policies governing the time, place, and manner for the exercise of constitutionally-protected speech and associational rights have been modified substantially since the events surrounding Schmid's arrest and now more fully and adequately define the nature of these restrictions. As we have indicated, the content of such regulations, recognizing and controlling the right to engage in expressional activities, may be molded by the availability of alternative means of communication. *Supra* at 563-564. These current amended regulations exemplify the approaches open to private educational entities seeking to protect their institutional integrity while at the same time recognizing individual rights of speech and assembly and accommodating the public whose presence nurtures academic inquiry and growth. As noted, however, these regulations were not in place when the University interfered with Schmid's reasonable efforts to communicate his political views to those present on its campus in April 1978. Hence, Schmid suffered a constitutional impairment of his State constitutional rights of speech and assembly and his conviction for trespass must therefore be undone.

Accordingly, for the reasons set forth, the judgment below is reversed.

Notes and Questions

1. For brief discussion of the First Amendment/state action aspects of this case, see *LHE*, § 1.4.2., p. 48.

2. Does the court's opinion in *Schmid* unduly interfere with the autonomy of private colleges and universities? Should the court have recognized some type of "institutional academic freedom" that would protect private institutions against such exercises of state power? See generally *LHE*, § 3.7.1., pp. 399-400, and Finkin, "On 'Institutional' Academic Freedom," 61 *Tex. L. Rev.* 817 (1983).

3. Regarding use of state constitutions as a source of individual rights, see *LHE*, § 1.5.3., pp. 53-56; and regarding state constitutions generally, see *LHE*, § 1.3.1.1., p. 13.

4. Princeton University revised its pertinent regulations in 1979, after the *Schmid* case was underway but before the Supreme Court of New Jersey's decision in 1980 (*LHE* at p. 656). What is the New Jersey's court's view of these amended regulations? How do they resolve the kind of problem raised in *Schmid*? Do these amended regulations constitute good policy?

5. *Schmid* concerned the situation where a member of the surrounding community enters the campus. Legal issues may also arise in the reverse situation, where a student or faculty member from the campus undertakes some activity in the surrounding community. See generally *LHE* § 5.7. One common issue in the latter context concerns the institution's authority to discipline students for off- campus misconduct. See *LHE*, § 4.5.2., pp. 458-459.

SEC. 5.6.4. Soliciting and Canvassing.

Board of Trustees of the State University of NY v. Fox
SUPREME COURT OF THE UNITED STATES
492 U.S. 469; 109 S. Ct. 3028
1989

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end.

I

The State University of New York (SUNY) has promulgated regulations governing the use of school property, including dormitories. One of these, Resolution 66-156 (1979), states:

> "No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events."

American Future Systems, Inc. (AFS), is a company that sells housewares, such as china, crystal, and silverware, to college students; it markets its products exclusively by the technique popularly called (after the company that pioneered it) "Tupperware parties." This consists of demonstrating and offering products for sale to groups of 10 or more prospective buyers at gatherings assembled and hosted by one of those prospective buyers (for which the host or hostess stands to receive some bonus or reward).

In October 1982, an AFS representative was conducting a demonstration of the company's products in a student's dormitory room at SUNY's Cortland campus. Campus police asked her to leave because she was violating Resolution 66-156. When she refused, they arrested her and charged her with trespass, soliciting without a permit, and loitering. Respondent Fox, along with several fellow students at SUNY/Cortland, sued for declaratory judgment that in prohibiting their hosting and attending AFS demonstrations, and preventing their discussions with other "commercial invitees" in their rooms, Resolution 66-156 violated the First Amendment.

* * * *

The District Court....found for the university on the ground that the SUNY dormitories did not constitute a public forum for the purpose of commercial activity and that the restrictions on speech were reasonable in light of the dormitories' purpose, 649 F. Supp. 1393 (1986).

A divided panel of the Court of Appeals for the Second Circuit reversed and remanded. 841 F.2d 1207 (1988).

* * * *

Viewing the challenged application of Resolution 66-156 as a restriction on commercial speech, and therefore applying the test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), the Court of Appeals concluded that it was unclear whether Resolution 66-156 directly advanced the State's asserted interests and whether, if it did, it was the least restrictive means to that end. The Court of Appeals therefore reversed the judgment and remanded to the trial court for "a suitable order" based upon "appropriate findings" on these points.[13] We granted certiorari, 488 U.S. 815 (1988).

II

In reviewing the reasoning the Court of Appeals used to decide this case,[14] the first question we confront is whether the principal type of expression at issue is commercial speech. There is no doubt that the AFS "Tupperware parties" the students seek to hold "propose a commercial transaction," *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), which is the test for identifying commercial speech....They also touch on other subjects, however, such as how to be financially responsible and how to run an efficient home. Relying on *Riley v. National Federation of Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988), respondents contend that here pure speech and commercial speech are "inextricably intertwined," and that the entirety must therefore be classified as noncommercial. We disagree.

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[13] On October 3, 1988, the same day on which we granted certiorari, the District Court issued its decision on remand, striking down Resolution 66-156 because it did not accomplish the State's goals through the least restrictive means possible. 695 F. Supp. 1409 (NDNY). By stipulation of the parties the District Court stayed its mandate and all further proceedings pending our action. See Stipulation, No. 82-CV-1363 (Nov. 23, 1988)

[14] Besides attacking the judgment on the ground that the Court of Appeals misperceived the constitutional principles governing restriction of commercial speech, the State argues that the resolution should be upheld even if the speech here was not commercial, because SUNY dormitories are not a public forum, and the restrictions constitute permissible "time, place, and manner" limitations. Pursuing such an analysis would require us to resolve both legal and factual issues that

Riley involved a state-law requirement that in conducting fund-raising for charitable organizations (which we have held to be fully protected speech) professional fund-raisers must insert in their presentations a statement setting forth the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charities (instead of retained as commissions). In response to the State's contention that the statement was merely compelled commercial speech, we responded that, if so, it was "inextricably intertwined with otherwise fully protected speech," and that the level of First Amendment scrutiny must depend upon "the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Ibid.* There, of course, the commercial speech (if it was that) was "inextricably intertwined" because the state law required it to be included. By contrast, there is nothing whatever "inextricable" about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

Including these home economics elements no more converted AFS' presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. As we said in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67-68 (1983), communications can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues....We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech. *Central Hudson Gas & Electric Corp. v. Public Service*

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the Court of Appeals did not address. Since we find that the Court of Appeals must be reversed on the basis of its own analysis, we decline to go further.

Comm'n of New York, 447 U.S., at 563, n. 5." We discuss this case, then, on the basis that commercial speech is at issue.

We have described our mode of analyzing the lawfulness of restrictions on commercial speech as follows:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson, supra*, at 566.

The Court of Appeals held, and the parties agree, that the speech here proposes a lawful transaction, is not misleading, and is therefore entitled to First Amendment protection. The Court of Appeals also held, and we agree, that the governmental interests asserted in support of the resolution are substantial: promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility. The Court of Appeals did not decide, however, whether Resolution 66-156 directly advances these interests, and whether the regulation it imposes is more extensive than is necessary for that purpose. As noted earlier, it remanded to the District Court for those determinations. We think that remand was correct, since further factual findings had to be made. It is the terms of the remand, however, that are the major issue here -- specifically, those pertaining to the last element of the *Central Hudson* analysis. The Court of Appeals in effect instructed the District Court that it could find the resolution to be "not more extensive than is necessary" only if it is the "least restrictive measure" that could effectively protect the State's interests.

Our cases have repeatedly stated that government restrictions upon commercial speech may be no more broad or no more expansive than "necessary" to serve its substantial interests, see, e.g., *Central Hudson*, 447 U.S., at 566....

* * * *

[W]e now focus upon this specific issue for the first time, and conclude that the reason of the matter requires something short of a least-restrictive-means standard.

Our jurisprudence has emphasized that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978). The ample scope of regulatory authority suggested by such statements would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State.

* * * *

None of our cases invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest. To the contrary, almost all of the restrictions disallowed under *Central Hudson*'s fourth prong have been substantially excessive, disregarding "far less restrictive and more precise means." *Shapero v. Kentucky Bar Assn.*, 486 U.S., at 476.

* * * *

On the other hand, our decisions upholding the regulation of commercial speech cannot be reconciled with a requirement of least restrictive means. In *Posadas*, for example, where we sustained Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents, we did not first satisfy ourselves that the governmental goal of deterring casino gambling could not adequately have been served (as the appellant contended) "not by suppressing commercial speech that might encourage such gambling, but by promulgating additional speech designed to discourage it." 478 U.S., at 344. Rather, we said that it was "up to the legislature to decide" that point, so long as its judgment was reasonable. *Ibid.*

* * * *

In sum, while we have insisted that "'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing ... the harmless from the harmful,'" *Shapero, supra*, at 478, quoting *Zauderer, supra*, at 646, we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," *Posadas, supra*, at 341 -- a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," In re *R. M. J., supra*, at 203; that employs not necessarily the least restrictive means but, as we have put it in the other contexts..., a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

We reject the contention that the test we have described is overly permissive. It is far different, of course, from the "rational basis" test used for Fourteenth Amendment equal protection analysis. See, e. g., *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109-110 (1949). There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here we require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, see *Zauderer, supra,* at 647, it must affirmatively establish the reasonable fit we require. By declining to impose, in addition, a least-restrictive-means requirement, we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) "traditionally subject to governmental regulation," *Ohralik v. Ohio State Bar Assn.*, 436 U.S., at 455-456. Far from eroding the essential protections of the First Amendment, we think this disposition strengthens them. "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Id.*, at 456.

III

Finally, we must address respondents' objection that, even if the principal First Amendment interests they asserted involve commercial speech and have not improperly been restricted, Resolution 66-156 must nonetheless be invalidated as overbroad, since it prohibits as well fully protected, noncommercial speech. Although it is true that overbreadth analysis does not normally apply to commercial speech...,that means only that a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground -- our reasoning being that commercial speech is more hardy, less likely to be "chilled," and not in need of surrogate litigators.

* * * *

Here, however, although the principal attack upon the resolution concerned its application to commercial speech, the alleged overbreadth (if the commercial-speech application is assumed to be valid) consists of its application to noncommercial speech, and that is what counts....

On the record before us here, Resolution 66-156 must be deemed to reach some noncommercial speech. A stipulation entered into by the university stated that the resolution reaches any invited speech "where the end result is the intent to make a profit by the invitee." App. 87. More specifically, a SUNY deponent authorized to speak on behalf of the university under Federal Rule of Civil Procedure 30(b)(6) testified that the resolution would prohibit for-profit job counseling in the dormitories, *id.*, at 133; and another SUNY official testified that it would prohibit tutoring, legal advice, and medical consultation provided (for a fee) in students' dormitory rooms, see *id.*, at 162, 181-183. While these examples consist of speech for a profit, they do not consist of speech that proposes a commercial transaction, which is what defines commercial speech, see *Virginia Pharmacy Board*, 425 U.S., at 761 (collecting cases). Some of our most valued forms of fully protected speech are uttered for a profit. See, e. g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

In addition to being clear about the difference between commercial and noncommercial speech, it is also important to be clear about the difference between an as-applied and an overbreadth challenge. Quite obviously, the rule employed in as-applied analysis that a statute regulating commercial speech must be "narrowly tailored," which we discussed in the previous portion of this opinion, prevents a statute from being overbroad. The overbreadth doctrine differs from that rule principally in this: The person invoking the commercial-speech narrow-tailoring rule asserts that the acts of his that are the subject of the litigation fall outside what a properly drawn prohibition could cover. As we put it in *Ohralik v. Ohio State Bar Assn.*, 436 U.S., at 462, he "attacks the validity of [the statute] not facially, but as applied to his acts of solicitation," whereas the person invoking overbreadth "may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him," *id.*, at 462, n. 20....Where an overbreadth attack is successful, the statute is obviously invalid in all its applications, since every person to whom it is applied can defend on the basis of the same over breadth.

* * * *

Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application to someone else. Respondents' invocation of the doctrine in the present case is unusual in that the asserted extensions of Resolution 66-156 beyond commercial speech that are the basis for their overbreadth challenge are not hypothetical applications to third parties, but applications to the student respondents themselves, which were part of the subject of the complaint and of the testimony adduced at trial. Perhaps for that reason, the overbreadth issue was not (in the District Court at least) set forth in the normal fashion -- viz., by arguing that even if the commercial applications of the resolution are valid, its noncommercial applications are not, and this invalidates its commercial applications as well. Rather, both commercial and (less prominently) noncommercial applications were attacked on their own merit -- with no apparent realization, we might add, on the part of either respondents or the District Court, that separate categories of commercial speech and noncommercial speech, rather than simply various types of commercial speech, were at issue.

* * * *

It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily -- that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. Moreover, the overbreadth question is ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is substantial, not only as an absolute matter, but "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma, supra*, at 615, and therefore requires consideration of many more applications than those immediately before the court. Thus, for reasons relating both to the proper functioning of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first.

In the present case, it has not yet been properly determined that the restrictions on respondents' commercial speech are valid as applied....[A] fortiori, we decline to resolve here the issue normally subsequent to rejection of the as-applied challenge, whether the statute is overbroad. We remand this case for determination, pursuant to the standards described above, of the validity of this law's application to the commercial and noncommercial speech that is the subject of the complaint; and, if its application to speech in either such category is found to be valid, for determination whether its substantial overbreadth nonetheless makes it unenforceable.

* * * *

The judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with this opinion.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The majority holds that "least-restrictive-means" analysis does not apply to commercial-speech cases, a holding it is able to reach only by recasting a good bit of contrary language in our past cases. I would have preferred to leave the least-restrictive-means question to another day, and dispose of the case on the alternative -- and, in this case, narrower -- ground of overbreadth[2]....

That Resolution 66-156 is substantially overbroad in its potential application to noncommercial speech is readily apparent. As the university interprets the resolution, any speech in a dormitory room for which the speaker receives a profit is speech by a "private commercial enterprise," prohibited by the resolution. See *ante*, at 482-483. As the majority correctly observes, *ante*, at 482, the resolution so interpreted prohibits not only commercial speech (i.e., speech proposing a commercial transaction), but also a wide range of speech that receives the fullest protection of the First Amendment. We have been told by authoritative university officials that the resolution prohibits a student from meeting with his physician or lawyer in his dorm room, if the doctor or lawyer is paid for the visit. We have similarly been told that the resolution prohibits a student from meeting with a tutor or job counselor in his dorm room. *Ibid.* Presumably, then, the resolution also forbids a music lesson in the dorm, a form of tutoring. A speech therapist would be excluded, as would an art teacher or drama coach.

A public university cannot categorically prevent these fully protected expressive activities from occurring in a student's dorm room. The dorm room is the student's residence for the academic term, and a student surely has a right to use this residence for expressive activities that are not inconsistent with the educational mission of the university or with the needs of other dorm residents

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[2] Although at times we have suggested that as-applied challenges should be decided before overbreadth challenges, see *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), we have often felt free to do otherwise, see *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Houston v. Hill*, 482 U.S. 451 (1987). Here, the Court has a choice between deciding the general question whether "governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end," *ante*, at 471, and the specific question whether this particular resolution is void because of unconstitutional overbreadth. Surely, the former question is the more sweeping one in terms of constitutional law.

(the distinction between tuba lessons and classical guitar lessons, or between drawing lessons and stone sculpture lessons, comes immediately to mind). See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); cf. *Kovacs v. Cooper*, 336 U.S. 77 (1949). It cannot plausibly be asserted that music, art, speech, writing, or other kinds of lessons are inconsistent with the educational mission of the university, or that a categorical prohibition of these activities is the "least-restrictive means" (or is even "narrowly tailored") to protect the interests of other dorm residents. Nor is there any possible basis for believing that in-dorm psychological or vocational counseling is incompatible with the university's objectives or the needs of other residents. Thus, the broad reach of Resolution 66-156 cannot be squared with the dictates of the First Amendment.

More important, the resolution's overbreadth is undoubtedly "substantial" in relation to whatever legitimate scope the resolution may have. See *Houston v. Hill*, 482 U.S. 451, 458 (1987); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). Even assuming that the university may prohibit all forms of commercial speech from a student's dorm (a proposition that is by no means obvious under our precedents),[3] the resolution's impermissible restrictions upon fully protected speech amount to a considerable portion of the resolution's potential applications. Because the resolution makes no effort to distinguish between commercial and noncommercial speech, or to narrow its scope to the perceived evil it was intended to address, see *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940), it sweeps within its reach far more protected expression than is tolerable under the First Amendment.

In this respect, the resolution here is equivalent to the one struck down on overbreadth grounds in *Jews for Jesus, supra*, a resolution that banned all "First Amendment activities" within the central terminal area of a major urban airport. By prohibiting all speech in a dorm room if the speaker receives a fee, the resolution in this case, like the resolution in *Jews for Jesus*, indiscriminately proscribes an entire array of wholly innocuous expressive activity, and for that reason is substantially overbroad. I therefore would hold Resolution 66-156 unconstitutional on its face now, in order to avoid chilling protected speech during the pendency of proceedings on remand.

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[3] For example, it is highly doubtful that the university could prohibit students from inviting to their rooms a representative from a birth-control clinic, from whom the students seek information about services the clinic provides for a fee. Cf. *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975).

Notes and Questions

1. Justice Scalia requires the lower court to use a "narrowly tailored" or "reasonable fit" test rather than a "least restrictive means" requirement when evaluating the SUNY resolution at issue in this case. Which test is more difficult for universities to meet, and why?

2. What is the difference between commercial and non-commercial speech? How do the First Amendment protections for commercial speech differ from those for non-commercial speech? What is the justification for a different standard of protection for commercial speech?

3. Justice Scalia distinguishes between two types of constitutional analysis regarding prohibitions on speech: "facial overbreadth" analysis, in which a regulation is challenged as invalid on its face and in its totality, irrespective of its particular application in the case at hand; and "unconstitutional-as-applied" analysis, in which a regulation is challenged as invalid only as it applies to the particular parties and facts before the court (other potential applications remaining valid). The majority refused to determine whether the regulation was unconstitutionally overbroad under the first form of analysis. Why? What directions did the Court provide for the lower court regarding its consideration of the overbreadth issue? Is the regulation at issue in *Fox* constitutionally overbroad, as Justice marshall suggests in his dissent?

4. The disputed regulation in *Fox* is broader than that challenged in earlier litigation involving Pennsylvania State University and American Future Systems (*LHE*, § 5.6.4.1., pp. 657-662). The regulation in *Fox* prohibited all commercial activity in residence hall rooms; Penn State's regulation, although restricting group demonstrations in residence hall rooms and common areas, permitted salespersons to conduct business with an individual student in her room if invited to do so by the student. Penn State's regulation also permitted group demonstrations could be presented if they had "educational" value, but the University would not permit an outside company to combine educational and commercial messages. Besides these differences between the regulations at issue in *Fox* and those in the prior *Penn State* litigation, the prior litigation did not have the benefit of *Fox*'s new interpretation of the judicial tests applicable to commercial speech. Would there have been any substantial difference in the reasoning of the court opinions in the earlier litigation had *Fox* already been decided? (For later developments in the *Penn State* litigation, also occurring before the Supreme Court's decision

in *Fox*, see *American Future Systems. Inc. v. The Pennsylvania State University*, 752 F.2d 854 (1985)).

5. How might one draft a regulation that permits tutoring and "educational" services performed for a fee while still prohibiting the kinds of commercial transactions that stimulated this litigation?

F.

CHAPTER VI: THE COLLEGE AND THE STATE GOVERNMENT

SEC. 6.3. State Chartering and Licensure of Private Postsecondary Institutions

Nova University v. Educational Inst. Licensure Commn.
District of Columbia Court of Appeals
483 A.2d 1172
1984

JUDGES: Before MACK and NEWMAN, Associate Judges, and GALLAGHER, Associate Judge, Retired.

OPINION: NEWMAN, Associate Judge:

Nova University (Nova) seeks review of an Order of the Educational Institution Licensure Commission (Commission) denying Nova's application for a license to offer Doctorate of Public Administration degree courses in the District of Columbia. The Commission denied the license, without prejudice, on the grounds that Nova had not complied with the District's licensing statutes and regulations with respect to adequate full-time faculty and adequate library resources.

Nova challenges the denial of its application for a license on the grounds that: (1) D.C. Code § 29-815 (1981), the District's licensing statute, is not applicable to schools, such as Nova, whose degrees are conferred outside the District of Columbia; (2) D.C. Code § 29-815 is unconstitutional on its face and as applied to Nova because it violates the First Amendment; (3) D.C. Code § 29-815 and the regulations guiding the issuance of licenses are unconstitutionally vague; and (4) the Commission's denial of a license was arbitrary, capricious, and unsupported by substantial evidence in the record.

We disagree with each of Nova's contentions, and therefore affirm the Commission's decision.

I

A preliminary review of the legislation relevant to this case and its history is helpful to place in context the issues raised by Nova. In 1929, the District of Columbia was not only the capital of the United States, but the "capital" for practically all diploma mills operating not only in the District, but throughout the United States and the world. *S. REP.* No. 611, 70th Cong., 1st Sess. (1928). This dubious distinction resulted from the District's lax laws relating the incorporation of educational institutions, the power these institutions had to confer degrees under their general charters, and the opportunity to advertise themselves as operating under the authority of the United States Government or Congress. *Id.* at 2. Hundreds of fraudulent institutions of "learning" incorporated in the District and sold degrees from baccalaureate to doctoral in every conceivable field of study with little or no academic work; in addition, the charters themselves were sold to individuals who carried on the "educational" programs in other states and countries. *Id.* at 2. At the urging of the United States Attorney's Office, local citizens and schools, sister jurisdictions and foreign countries, Congress enacted a statute "to Regulate Degree-Conferring Institutions in the District of Columbia." Pub. L. No. 70-949, § 586a, 45 Stat. 1504 (1929) (codified at D.C. Code §§ 29-815 to 818 (1981)). The statute requires licensing of all degree-conferring institutions incorporated in the District or incorporated in another state but operating in the District, and is set out in relevant part below:

> § 29-815. License to confer degrees -- Issuance by Educational Institution Licensure Commission required.
>
> No institution...incorporated under the provisions of this chapter shall have the power to confer any degree in the District of Columbia or elsewhere, nor shall any institution incorporated outside of the District of Columbia..., undertaking to confer any degree, operate in the District of Columbia, unless..., by virtue of a license from the Educational Institution Licensure Commission, which before granting any such license may require satisfactory evidence:
>
> (1) That in the case of...an incorporated institution, a majority of the trustees, directors, or managers of said institution are persons of good repute and qualified to conduct an institution of learning;

> (2) That any such degree shall be awarded only after such quantity and quality of work shall have been completed as are usually required by reputable institutions awarding the same degree...;
>
> ....
>
> (4) That considering the number and character of the courses offered, the faculty is of reasonable number and properly qualified, and that the institution is possessed of suitable classroom, laboratory, and library equipment.

D.C. Code § 29-815 (1981).

The statute provides for criminal penalties against anyone "who shall, directly or indirectly, participate in, aid, or assist in the conferring of any degree by any unlicensed...institution....D.C. Code § 29-819 (1981).

In 1977, the Council of the District of Columbia established the Educational Institution Licensure Commission to perform licensing functions under D.C. Code § 29-815. See D.C. Code § 31-1601 to 1608 (1981). The purpose of this legislation is outlined in its opening section and set out, in part, below:

> To provide for the protection, education, and welfare of the citizens of the District of Columbia, its private educational institutions, and its students, by:
>
> (1) Establishing minimum standards concerning quality of education, ethical and business practices, health and safety, and fiscal responsibility to protect against substandard, transient, unethical, deceptive, or fraudulent institutions and practices;
>
> (2) Prohibiting the granting of false or misleading educational credentials;
>
> (3) Regulating the use of academic terminology in naming or otherwise designating educational institutions;
>
> (4) Prohibiting misleading literature, advertising, solicitation, or misrepresentation by educational institutions or their agents.

D.C. Code § 31-1601 (1981).

In 1980, the Council amended the 1977 statute, giving legislative sanction to regulations previously promulgated by the Commission's predecessor, the Board of Higher Education. D.C. Code § 31-1606(a) (1981). These regulations set forth the procedures and criteria by which licenses are issued and revoked. See *Regulations Relating to the Licensing of Institutions Which Confer Degrees* (1978) [hereinafter *Regulations*].

Section III of the *Regulations* contains eleven criteria the Commission is to consider in issuing licenses, involving inquiry into: institutional control; administrative staff and procedures; financial resources; number and quality of faculty; curricula, correspondence, extension, and summer session programs; admission requirements; library; physical plant and equipment; student personnel, health, and recreational services; and institutional publications. Applicants for a license are required to submit a statement as to how they plan to meet the criteria or give reasons why they consider themselves justified in not meeting a particular requirement. *Regulations* at § III (1)-(11). The regulations provide for flexibility, recognizing that "the...criteria will not be equally applicable to each institution wishing to award degrees." *Id.* Applicants are entitled to a de novo hearing prior to the denial of a license, and to judicial review if a license is denied. *Id.* at § IV (e), (4)(2).[1]

II

It is against this statutory background that this case arose. Nova University is a non-profit corporation organized and existing under the laws of Florida. In addition to undergraduate, graduate, and professional curricula taught at its home campus in Fort Lauderdale, Nova has instituted a variety of field-based, or external degree programs, designed to lead to the conferral by Nova in Florida of various degrees for professional persons. The field-based program of concern here is the Doctorate of Public Administration (DPA). Candidates for this degree are not required to fulfill traditional residence requirements at the Nova campus in Fort Lauderdale. Instead, they form "clusters" of 20 to 25 students who meet at a site in the areas where they live. At the time of the hearing, Nova was operating 11 clusters at various locations throughout the United States, with plans to increase to 15 in the near future.

Nova's DPA program requires a minimum of three years to complete and consists of nine sequences (analogous to semesters or quarters), with each sequence consisting of three to four "units"

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[1] Section IV of the Commission's *Regulations* regarding the applicant's right to a hearing and appeal parallel the District of Columbia Administrative Procedure Act, D.C. Code §§ 1-1509, -1510 (1981 & 1984 Supp.).

(analogous to courses). Six of the nine sequences are taught at the cluster sites, and each of the units meets once a month for approximately eighteen to twenty hours from Friday night through Saturday. The remaining three sequences are taught in residence in Ft. Lauderdale. Each of these last about one week and occur annually.

The faculty of the DPA program consists of approximately nine professors from Nova's Florida campus and thirty-three national members, called preceptors. Generally, preceptors travel to the clusters to teach local course units and the Florida-based faculty teaches Florida units. Preceptors are academicians and practitioners in the public administration field, most of whom also teach at universities with traditional residence requirements. In addition, each cluster is coordinated by a cluster director, a contract employee living in the cluster area whose role consists of administrative and recruitment duties as well as counseling students.

In addition to preparing papers in anticipation of the unit sessions, students must complete a series of research papers, pass comprehensive written and oral examinations, and complete a final paper, an "analytical research project," which Nova deems to be the equivalent of a doctoral dissertation. The research papers are supervised by Nova's faculty in Ft. Lauderdale, during the annual week long conferences, as well as by telephone and written communication. The two-day comprehensive written examination is prepared and graded by the faculty in Florida, but administered locally. The oral examination is taken in Florida and administered by faculty members. If a student successfully completes the course work, comprehensive oral and written tests, and analytical research project, Nova awards a Doctor of Public Administration, under powers derived from its incorporation in Florida.

Since 1971, Nova has been accredited by the Southern Association of Colleges and Schools (SACS), the officially recognized regional accrediting association of the southeastern United States. Nova's accreditation was most recently affirmed for a ten-year period after a review in 1974-75 of its educational programs, including its external degree programs, such as the one here at issue. In 1980, SACS separately reviewed Nova's field-based programs, including the DPA program, and this review had no effect on Nova's accreditation.

In October 1980, Nova applied to the Commission for a license to offer DPA degree courses in the District of Columbia. In response to Nova's application, the Commission appointed a three-person evaluation team, composed of non-members of the Commission and approved by Nova, to visit Nova in Florida to determine whether Nova's DPA program met the District's statutory and regulatory criteria for licensing.

The team issued a report recommending denial of a license. Nova responded to the team report, pointing out what it believed were factual errors, and providing the Commission with

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additional information and proposals. The Commission then appointed a Task Force, made up of two Commission members, to evaluate the team's report and Nova's response. On March 4, 1981, the Task Force submitted its findings and concluded that the Commission should deny licensure. The Commission approved the recommendations of the site evaluation team and notified Nova of its intention to deny a license, the reasons for this intent, and Nova's right to request a hearing.

A de novo hearing was held before the Commission on August 19, 23, and 24, 1982. On January 19, the Commission rendered its decision denying Nova's license application, concluding that Nova failed to demonstrate that it would have adequate full-time faculty or adequate library resources in the District of Columbia as required by D.C. Code § 29-815(4) and the *Regulations* § IV(e). Although the Commission denied the license, it did so without prejudice to Nova renewing its application, and offered to explain to Nova how it could meet the faculty and library requirements.

III

As a preliminary matter, we must address Nova's contention that this court can and should avoid the constitutional questions raised in this case by interpreting D.C. Code § 29-815 as excluding Nova from the licensing requirement. Section 29-815 requires "any institution incorporated outside of the District of Columbia...undertaking to confer any degree, operate in the District of Columbia ..." unless it obtains a license from the Commission. Nova suggests that we interpret the statute as reading "undertakes to confer any degree in the District of Columbia." Such a reading would exclude Nova from the license requirement because Nova confers its degree in Florida.

In urging this statutory interpretation, Nova reminds us of the well-established rule of statutory construction -- a court "will not pass on the constitutionality of an act...if a construction of the statute is fairly possible by which the question may be avoided." *United States v. Clark*, 445 U.S. 23, 27, (1980)....The operative words of this axiom, however, are "fairly possible," for a court cannot avoid constitutional questions by interpreting a statute in a way that is unreasonable in light of the language, purpose, and history of the legislation. See, e.g., *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 103 S. Ct. 2926, 2933, n. 10, (1983).

Examining the language of § 29-815 we note the quite obvious fact that the statute does not contain the words Nova urges us to insert. Rather, the statute plainly requires degree conferring institutions incorporated outside the District to obtain a license to operate in the District without regard to where the degree is conferred.[2] "Operating" is defined as "maintain[ing] any facility or location in the District...through which education is offered or given, or educational credentials are offered or granted, and includes contracting with any person, group, or entity, to perform any such act." D.C. Code § 31-1602(11) (1981). Given this definition and the fact that no words in the statute limit the licensing requirement to schools conferring degrees in the District, this plain language alone is sufficient for this court to reject Nova's argument. We have stated on numerous occasions that when the language of a statute is clear and admits of no more than one meaning, we are not empowered to look beyond the literal words of the statute. See, e.g., *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979); *United States v. Stokes*, 365 A.2d 615, 618 (D.C. 1976); *Harrison v. J. H. Marshall & Associates*, 271 A.2d 404, 406 (D.C. 1970). Much less are courts free to insert words into a statute that is complete and clear on its face where, as here, the words would render the "operating" clause of the statute superfluous and be contrary to the clear intent of Congress. See *Hurst v. V & M of Virginia*, Inc., 293 Md. 575, 446 A.2d 55, 56-57 (1982).

The language of the statute, as well as its legislative history, plainly indicate Congress' intention to comprehensively regulate degree conferring institutions operating in the District of Columbia, whether the institutions were incorporated in the District or were foreign corporations seeking to operate in the District.

IV

We turn now to Nova's argument that § 29-815 violates the First Amendment "on its face"[3] and as applied to Nova. As discussed previously, D.C. Code § 29-815 requires private educational institutions incorporated in the District to obtain a license as a condition to conferring a degree. Nova does not challenge this aspect of the statute, stating that the District may arguably regulate the "conduct" of degree conferral. However, Nova contends that the additional statutory requirement that private schools incorporated elsewhere and which undertake to confer degrees obtain a license as a condition to "operating" in the District, is unconstitutional because it licenses and regulates "pure speech" on the basis of quality. Nova points out that it has the authority to confer degrees from the state of Florida and seeks only to teach its degree program in the District. Because the District has no extrajurisdictional power to regulate Nova's *degree conferral, Nova contends* that the District is necessarily licensing teaching.

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[2] Compare *Nova University v. The Board of Governors of the University of North Carolina*, 305 N.C. 156, 287 S.E.2d 872 (1982). North Carolina's licensing statute expressly authorizes licensing to confer degrees, and contains no licensing requirement to "operate." The North Carolina court held that the statute could not be construed beyond its terms to authorize the Board to require a license for Nova's teaching of degree-credit courses in North Carolina where the degree was to be conferred in Florida.

[3] A facial challenge in this context is an assertion that the statute is unconstitutional not only as applied to Nova, but also in any conceivable application....

We reject this argument at the outset as well as the artificial conduct/speech distinction Nova draws because it has no practical of First Amendment substance. First, § 29-815 does not regulate or license teaching or "pure speech." The "operating" clause of § 29-815 merely subjects out-of-District schools to the same regulations as schools incorporated in the District, e.g. both have unfettered freedom to teach so long as no degree credits or degrees are promised or given. According to the Senate Report, "institutions which do not undertake to confer degrees do not come within the purview of this bill." *S. REP*. No. 611, 70th Cong., 1st Sess., at 4 (1928). The 1929 congressional statute was described in its title as an amendment to the D.C. Code "Relating to Degree-Conferring Institutions." Pub. L. No. 79-949, § 586a, 45 Stat. 1504 (1929). The statute itself states that schools incorporated in the District are required to obtain a license "to confer a degree," and schools incorporated elsewhere "undertaking to confer a degree" must obtain a license to "operate" in the District. The regulations setting forth the criterion for licensing are entitled "Regulations Relating to the Licensing of Institutions which Confer Degrees." The statutory penalties apply to anyone "who shall, directly or indirectly, participate in, aid, or assist in the conferring of any degree by any unlicensed...institution...." D.C. Code § 29-819 (1981). And in *Kraft v. Board of Education*, 247 F. Supp. 21, 25 (D.D.C. 1965), cert. denied, 386 U.S. 958, 18 L. Ed. 2d 106, 87 S. Ct. 1026 (1967), the court affirmed revocation of a license to award a degree, observing that the absence of a license did not prevent schools from teaching non-degree subjects or programs in the District. In short, Nova would not have needed to apply to the Commission for a license (an application requesting "a License to Offer Doctorate of Public Administration Degree Courses in the District of Columbia") nor would Nova be before this court if it did nothing in the District of Columbia but teach.

Second, the District's power to regulate Nova is no different than its power to regulate educational institutions incorporated in the District. Nova does not and could not contest the power of the District to regulate degree conferral by its own institutions. Compare *New Jersey Board of Higher Education v. Shelton College*, 90 N.J. 470, 448 A.2d 988 (1982) (*Shelton II*). Educational institutions have no inherent or constitutional right to confer degrees; rather, degree conferral is business conduct, a corporate privilege conferred by the state of incorporation. *Id.* at 990; *National*

Association of Certified Public Accountants v. United States, 53 App. D.C. 391, 292 F. 668 (1923); *Townshend v. Gray*, 62 Vt. 373, 19 A. 635, 636 (1980). Schools are not shielded by the First Amendment from governmental regulation of business conduct deemed detrimental to the public merely because they are engaged in First Amendment activities....Although Nova has the power to confer degrees from the state of Florida, as a foreign corporation, Nova has no constitutional right to operate its degree program in the District of Columbia, e.g., *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 119, 21 L. Ed. 2d 242, 89 S. Ct. 286 (1968); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181, 19 L. Ed. 357 (1868), and the District may impose the same restrictions upon Nova as it imposes upon its own degree-conferring schools. E.g., *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243, 51 L. Ed. 168, 27 S. Ct. 126 (1906); *Orient Insurance Co. v. Daggs*, 172 U.S. 557, 43 L. Ed. 552, 19 S. Ct. 281 (1899); *Paul v. Virginia, supra; Watergate South, Inc. v. Duty*, 464 A.2d 141, 144 n.5 (D.C. 1983).

Finally, the most serious flaw in the conduct/speech distinction drawn by Nova is that it has no First Amendment relevance and, if accepted, would undermine the very freedoms Nova asserts in this case. As we have already stated, in requiring schools incorporated outside the District to obtain a license to operate degree programs in the District, the District is regulating no more and no less than when it requires schools incorporated in the District to obtain a license to confer a degree. The question in each case is whether the school meets minimal academic standards as set out in the statute and regulations. Yet under the conduct/speech distinction drawn by Nova, Nova may engage in exactly the same activities in the District as a college incorporated in the District, and although D.C. Code § 29-815 would have an identical impact on both schools, the District is absolutely prohibited by the First Amendment from regulating Nova but not from regulating a District school, merely because Nova is incorporated elsewhere. We cannot accept a theory of the First Amendment that conditions its protection on where a school is incorporated.

Our holding that D.C. Code § 29-815 regulates the business conduct of degree conferral and leaves schools free to teach does not end our First Amendment inquiry, for although degree conferral and the operation of degree programs are "privileges" granted by the District, the District can not place conditions on the receipt of these privileges that themselves violate the Constitution or require the recipient to forego the exercise of fundamental rights. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967); *Speiser v. Randall*, 357 U.S. 513, 518, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958). Nor can the District regulate its businesses in ways that impinge on fundamental rights. E.g., *Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583, 593-99, 70 L. Ed. 1101, 46 S. Ct. 605 (1926).

Educational institutions, as well as individuals, have a First Amendment right to teach and to academic freedom. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)...; *Keyishian, supra*, 385 U.S. at 603; see generally Finkin, "On "Institutional" Academic Freedom," 61 *Tex. L. Rev*. 817 (1983). In his concurring opinion in *Sweezy v. New Hampshire* [354 U.S. 234 (1957)],[6] Justice Frankfurter characterized academic freedom as the right of an educational institution to be free from direct or indirect "governmental intervention in the intellectual life of a university," 354 U.S. at 262, and summarized the "four essential freedoms" that constitute academic freedom as the right of a university "'to determine for itself on academic grounds who may teach, what may be taught, and how it shall be taught, and who may be admitted to study.'" *Id.* at 263....

It cannot be gainsaid that D.C. Code § 29-815, by requiring educational institutions to obtain a license as a condition to operating a degree program and predicating that license on meeting District criteria, interferes with an educational institution's operation. In particular, Nova was denied a license because the Commission found that its library and faculty resources did not meet District requirements. However, to say that D.C. Code § 29-815 constrains a degree-granting educational institution's freedom to make decisions as to how an educational program will be run, is not to say that the constraints violate the First Amendment. Not every limit on institutional autonomy also implicates academic freedom. See *Kunda v. Muhlenberg College*, 621 F.2d 532, 547 (3d Cir. 1980). The Supreme Court has recognized that First Amendment freedoms are not absolute and "the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 52 U.S.L.W. 4594, 4598, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984) (citing *Schenck v. United States*, 249 U.S. 47, 52, 63 L. Ed. 470, 39 S. Ct. 247 (1919)). See also *Shelton II, supra*, 448 A.2d at 993-99.

In determining whether § 29-815 violates the First Amendment, we look first to whether the statute is content-neutral, for however valid the government's interest in regulating, it generally cannot be pursued by discriminating between particular viewpoints and information. E.g., *City Council of Los Angeles v. Taxpayers for Vincent, supra*, 52 U.S.L.W. at 4598-99. The Supreme Court has consistently recognized that if the constitutional guarantee means anything, it means that, ordinarily at least, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972); ...see generally Farber, "Content Regulation and the First Amendment: A Revisionist View," 68 *Geo. L.J.* 727 (1980); Redish, "The Content Distriction in First Amendment Analysis," 34 *Stan. L. Rev.* 113 (1981).

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[6] In Sweezy, the Court reversed the contempt conviction of a professor called before a one-man state investigative "team" to answer questions regarding, inter alia, the content of his lectures. Although the court's plurality opinion rested on due process grounds, the Court stressed the threat to academic freedom that the conviction presented. *Sweezy, supra*, 354 U.S. at 250.

We think it evident that the general rule that forbids the government to regulate speech on the basis of content has no application to this case, for there is not even a hint of bias or censorship in Congress' enactment or the Commission's enforcement of D.C. Code § 29-815. In enacting § 29-815, Congress was not motivated by hostility to particular ideas, opinions, or educational philosophies,[7] nor was Congress concerned with harms that might occur from public exposure to particular information.[8] The sole interest of Congress was to ensure that degree-conferring educational institutions incorporated or operating in the District met minimal academic standards -- whatever their message was, and to protect the public against harms arising from the abuse and misuse of degree-conferring powers, harms that arose independently of any message or teaching that might or might not precede degree conferral. On their face, the statutory and regulatory criteria for licensing are content neutral, censoring no subject, opinion, or educational philosophy. And contrary to Nova's suggestion, we do not believe that Commission inquiry into faculty qualifications, library resources, and curriculum content necessarily makes the statute content-related or amounts to a constraint on academic freedom.[9] This inquiry is limited to neutral, sound, academic criteria, not intended or likely to intrude upon the legitimate intellectual life of a university, but to ensure that when a university confers a degree, it does indeed have an intellectual life and the minimal resources essential to support that life. Nor is there any suggestion that the Commission denied Nova a license because of the particular subjects it teaches, content of books it provides, or views of its teachers. Nova was denied a license because the Commission found that Nova's plans to use Howard University's library facilities rather than providing their own, and Nova's use of field-based teachers with no resident faculty in the District, did not meet the District's requirements for adequate faculty and library resources. Although application of the statute to Nova may be burdensome in a financial and administrative sense, and limits Nova's institutional prerogatives, we do not believe these constraints intrude upon Nova's right to academic freedom or free speech. It cannot be said that requiring a library and teachers is incompatible with the academic endeavor or with intellectual freedom within a university.[10]

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[7] Compare *Keyishian v. Board of Regents, supra*, and *Sweezy, supra*, where government intervention in university life was motivated by hostility to a political philosophy.

[8] Compare *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), where the state invalidly prohibited the teaching of foreign languages because of concern that it prevented immigrant assimilation into American society; and *Linmark Assocs. Inc. v. Township of Willingboro*, 431 U.S. 85, 52 L. Ed. 2d 155, 97 S. Ct. 1614 (1977), where a township invalidly prohibited posting of "For Sale" signs in yards due to its belief that this information promoted "white flight" from neighborhoods.

[9] See generally Finkin, *supra* at 854, where the author distinguishes institutional autonomy from academic freedom, and concludes that when the state does not directly regulate teaching or research, the question of whether a restraint on institutional autonomy is also an unconstitutional restraint on academic freedom will depend in each case on the purpose and effect of governmental action, "its compatibility with the academic enterprise, whether procedural safeguards for the institution are available, and the likely effect of the inquiry on academic freedom and the conduct of educational affairs." *Id.* at 855. In this regard, the author contrasts the loyalty-security investigations of professors in the 1950's, e.g., *Sweezy, supra*, the purpose and effect of which were "bluntly antithetical" to academic freedom, with state regulation of degree-conferring institutions on the basis

When governmental regulation, as in this case, is not aimed at the content of speech but nevertheless has an incidental impact on the exercise of communicative activity, the regulation will not violate the First Amendment so long as it does not unduly restrict the communication of ideas. *Cox v. New Hampshire*, 312 U.S. 569, 574, 85 L. Ed. 1049, 61 S. Ct. 762 (1941); see also *Konigsberg v. State Bar*, 366 U.S. 36, 50-51, 6 L. Ed. 2d 105, 81 S. Ct. 997 (1961).

In *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), the Supreme Court set forth the framework for reviewing a viewpoint neutral regulation of this kind:

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of sound academic criteria, which might involve inquiry into faculty quality and content of curriculum, but does not constitute an impermissible invasion of academic freedom.

[10] ....Nova contends that the expert testimony it presented, particularly that of the Chairman of Harvard University's Government Department, compels us to overturn the Commission's decision. By a post-argument submission, Nova calls our attention to a recent decision of the United States Supreme Court in *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984). We find nothing in *Munson* which compels a decision contrary to the one we reach. In the hearing before the Commission, there was conflicting expert testimony. For example, the Dean of the School of Community and Public Affairs at Virginia Commonwealth University was critical of the faculty arrangements provided by Nova, and questioned whether these provisions would meet the national standards of the National Association of Schools of Public Affairs. There was other expert testimony that was similarly critical, both as to faculty arrangements and as to library facilities. The Commission was entitled to choose which expert testimony it credited. *Citizens Association of Georgetown, Inc. v. District of Columbia*, 402 A.2d 36 (D.C. 1979) (en banc).

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

We have already addressed the power of the District to regulate the business activities of its own educational institutions and we have held that the District's interest in this case is not aimed at suppressing speech, but rather in preventing the harms that arise when educational institutions abuse their degree-conferring authority. Thus, the critical inquiries in this case are whether D.C. Code § 29-815 furthers a substantial interest and whether the effect of the statute on speech and academic freedom is no greater than necessary to protect the District's interest.

The interest that the District asserts is that of ensuring minimal educational standards among degree-conferring institutions within its borders. The substantial interest and broad discretion that the state has in regulating its schools and the quality of education provided to its citizens is also well established. *Meyer v. Nebraska, supra* note 8....

The interest the District has in regulating degree conferral was well set out by the New Jersey Supreme Court in *Shelton College v. State Board of Education*, 48 N.J. 501, 226 A.2d 612 (1967) (*Shelton I*), in which the court upheld a licensing scheme similar to our own in the face of a First Amendment freedom of speech challenge. In *Shelton I*, the court began by holding that New Jersey had the constitutional power to and interest in regulating private educational institutions, quoting Chief Justice Marshall's statement in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819): "That education is an object of national concern, and a proper subject of legislation, all admit." *Shelton I, supra*, 226 A.2d at 618. The court further found that regulation of degree conferral was especially appropriate "evidential as it is of academic achievement" and "'intimately related to the public welfare'". *Id.* (quoting Elliott, *The Colleges and the Courts* at 200 (1936)). Rejecting Shelton College's suggestion that the public needed no protection from non-professional degree programs, the court noted:

> Government and private segments of our society look to the degree for evidence of achievement and capacity....Indeed,...some or all of the study required for a bachelor

> degree is prerequisite for most professional degrees, and licensing authorities,...must depend upon the quality of the instruction given by the colleges, academic as well as professional.

Shelton I, supra, 226 A.2d at 619. As to Shelton's suggestion that private accreditation societies are adequate to deal with the problem, the court responded that as useful as private accreditation societies are in developing standardization with respect to degrees, they "cannot stop the substandard school or close the out-and-out degree mill." *Id.* Finally, the court noted that educators themselves had called for stricter state regulation of academic standards for degrees since the turn of the century and quoted from a proposed model statute prepared in 1961 by the Council of State Governments, as "summing up the public need for regulation" of institutions that confer degrees:

> It is the policy of this state to prevent deception of the public resulting from the conferring and use of fraudulent or substandard degrees. Since degrees, diplomas and similar measures of academic achievement are constantly used by employers in judging the training of prospective employees; by public and private professional groups in determining qualifications for admission to and continuance of practice; and by the general public in assessing the extent of competence of persons engaged in a wide range of activities necessary to the general welfare, regulation by law of such evidences of academic achievement is in the public interest. To the same end, the protection of legitimate institutions and of those holding degrees from them is also in the public interest.

Id. at 620.

These tenets were reiterated by the New Jersey Supreme Court in *Shelton II*.

Like the New Jersey Supreme Court, we find that the District's interest in this case is substantial. Indeed, as already discussed, such regulation is essential if the purposes of the statute are to be met. See discussion, *supra* at 9.

Nova contends that however substantial the District's interests are, they are not being furthered by the licensing statute. First, Nova points out that education in our society occurs in a national marketplace and that the District cannot prevent persons, including its own citizens, from receiving degrees from other jurisdictions with less stringent incorporation and degree conferral laws, and then returning to the District to use the degree. Second, Nova argues that the licensing criteria are not rationally related to determining whether an educational institution is substandard.

We do not agree that the licensing statute is ineffective in or unrelated to accomplishing the District's purposes. We reject at the outset any suggestion that because the District cannot impose its educational standards nationwide, the statute is ineffective and the District must forego all attempts to ensure that educational standards are met by those schools operating in the District. Moreover, Nova's assertion that the licensing criteria are unrelated to determining whether an educational institution is substandard is not only incorrect but flows from the erroneous premise that nothing less than actual proven fraud or lack of quality would justify denying Nova a license. Section 29-815 is a prophylactic regulation -- intended to prevent harm before it occurs. The Commission in denying a license is not deciding that an educational institution is in fact "substandard, transient, unethical, deceptive, or fraudulent," D.C. Code § 31-1601(1) (1981), but rather that the applicant's failure to meet District criteria creates the probability that the harms with which the District is concerned will occur. We do not believe it can be accurately said that the licensing criteria in general and as specifically applied to Nova are not generally recognized indicia of legitimate and minimally qualified institutions of higher learning. Moreover, the regulations expressly recognize that the criteria will not apply equally in all situations, thereby providing the flexibility essential to ensure quality and legitimacy without discouraging diversity and innovation in higher education or injuring nascent education institutions. In this case, the Commission's perception of the potential for harm was not unreasonable, and the efficacy of the District's efforts to prevent harm to prospective employers and students would be substantially diminished if the state could act only after injury occurred.

The next question we must ask is whether the effect of § 29-815 on the free speech and academic freedom of educational institutions is no greater than necessary to further the District's interests. Nova contends that the principle that statutes touching First Amendment freedoms must be narrowly drawn dictates that the District must aim specifically at the fraudulent educational institutions and the out-and-out diploma mill, and leave "quality" determinations to private accrediting associations and the educational consumer. This argument not only ignores the practical difficulties of detecting illegal activities by educational institutions and successfully prosecuting them under criminal fraud laws, but overlooks the fact that the District has a substantial interest in preventing degree conferral by non-fraudulent but nevertheless substandard educational institutions. And although private accrediting institutions serve a valuable role in providing information to the public regarding the academic standards at various schools, these organizations are voluntary and can do nothing to prevent the substandard or fraudulent school from conferring a degree. Requiring full disclosure from schools and letting the educational consumer choose is inadequate. That individuals may choose with full knowledge to spend their money for a degree that has no academic substance does not mean that the District may not act to foreclose that choice where it is inherently harmful to the integrity of legitimate educational institutions, employers, and the public in general.

Finally, Nova asserts that § 29-815 creates such substantial burdens on the exercise of First Amendment freedoms that it cannot be justified despite the District's substantial interest. Specifically, Nova points to the lengthy and expensive administrative process it went through only to be denied a license in the final analysis "merely" because Nova would provide no library of its own and would utilize national faculty rather than placing any faculty in the District. Although we recognize the burdens this statute places on Nova, we do not believe they amount to a First Amendment violation. There is simply no evidence that the length and complexity of the administrative process in this case arose from a lack of diligence on the Commission's part or of covert hostility toward Nova's educational program, or any particular subject taught or opinion held by Nova's teachers. Nova's application was denied without prejudice, and the record reflects that the Commission is prepared to exercise the flexibility provided for in the *Regulations* to accommodate Nova's external degree program. Requiring Nova to provide some resident faculty and a library for District students does not prevent Nova from implementing its unique field-based program -- it merely requires Nova to devote more resources to the program in the District.

In conclusion, Nova has failed to demonstrate that the District's licensing requirement is inherently, or as applied to Nova, an unreasonable limitation of educational institutions' right to free speech and academic freedom. We are reassured in our conclusion by the fact that applicants for a license are entitled to extensive procedural protections, including judicial review, for we are not unmindful that regulation of schools in the name of quality not only poses risks to First Amendment freedoms but could have the effect of discouraging the innovation, diversity, and vitality that we value in a pluralistic society. Nevertheless, we believe that the very importance of these institutions to the citizens of the District and to society at large negate any suggestion that the state does not have a substantial and indeed compelling interest in regulation that advances the quality and integrity of higher education.

Requiring degree-conferring institutions to meet reasonable academic standards is not only in the best interests of the public, but also in the best interests of educational institutions, for in the last analysis, the viability of such institutions depends in large part on public esteem and support. The First Amendment cannot be used as a shield to protect substandard or fraudulent degree conferring educational institutions and the District can insist that schools who operate degree programs in the District provide the minimal resources and education appropriate to the degree conferred.

V

Nova next contends that the statutory standards for licensure violate the First Amendment because they are impermissibly vague. Having held that § 29-815 is not void on its face and has only an incidental and limited impact on speech, Nova's vagueness challenge can succeed only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982) (footnote omitted).

In due process vagueness challenges, we look to see whether the statute provides explicit standards so that the law gives "the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and prevents "arbitrary and discriminatory applications." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972). E.g., *District of Columbia v. Gueory*, 376 A.2d 834 (D.C. 1977). Whether a statute is sufficiently precise will "depend in [large] part on the nature of the enactment." *Hoffman Estates v. Flipside Hoffman Estates, supra*, 455 U.S. at 498. Business regulations are not subject to a strict vagueness test, not only because the subject matter regulated is often more narrow, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972) (dictum; collecting cases), but also because businesses can be expected to investigate relevant legislation and plan behavior accordingly. E.g., *United States v. National Dairy Products Corp.*, 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963). Additionally, the regulated enterprise often has the opportunity to clarify their standards through their own inquiry as well as through the administrative process. See *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 49, 16 L. Ed. 2d 336, 86 S. Ct. 1254 (1966); *McGowan v. Maryland*, 366 U.S. 420, 428, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961). Finally, perhaps the most important factor affecting the clarity that a law must have is whether it threatens to inhibit the exercise of constitutionally protected rights of free speech. E.g., *Grayned v. City of Rockford*, 408 U.S. at 109.

The statute at issue here is a business regulation that Nova has had ample opportunity to clarify. The licensing criteria at issue relate to the number of faculty Nova is required to provide and the type of library resources, implicating First Amendment rights tangentially, if at all. Applying the standard of review appropriate under these circumstances, Nova's facial challenge must fail, for the statute and regulations are sufficiently clear as applied to Nova.

D.C. Code § 29-815 requires Nova to have "faculty...of reasonable number" for the number and nature of courses taught, and the *Regulations* require, in relevant part, "a sufficient number of full-time teaching appointments to ensure continuity and stability of the educational association between students and faculty." *Regulations* § III (4)(b). As to library requirements, § 29-815 requires Nova to "possess...suitable...library equipment" and the *Regulations* require that the library have a "collection of books...adequate for the needs of the [particular] educational program [offered]; continuous acquisition of current library materials[;]...professionally trained staff [; and adequate] ...seat[ing] and work space." *Regulations* § III(8)(a)-(d). We simply cannot agree that Nova was not put upon notice by the language of the statute and regulations as well as the interaction with Commission staff prior to the hearing that using another school's library and relying exclusively on field-based professors in a doctoral program would not satisfy the District's requirements. Moreover, we note that the Commission has offered to meet with Nova to clarify exactly what Nova must do to meet District requirements. We are not persuaded that the standards did not give Nova "fair notice" of what was required.

Nova also contends that the statute and regulations provide insufficient standards for enforcement, permitting ad hoc and discriminatory action by the Commission on invidious and irrelevant grounds. However, Nova presents no evidence that the statute has been enforced in this case in a discriminatory manner or with the aim or effect of inhibiting free speech or academic freedom. Although the terms "adequate", "sufficient" and "reasonable" leave room for discretionary enforcement, the constitutional sufficiency of these terms cannot be judged in a vacuum. The context must be considered, e.g., *American Communications Association v. Douds*, 339 U.S. 382, 412, 94 L. Ed. 925, 70 S. Ct. 674 (1950), because the context not only gives concreteness to what seems abstract, but it also demonstrates that despite its generality, a broad standard is all that sensibly may be expected if the Commission is to be equal to the sundry situations that may arise. Here the regulations acquire content not only from the overall objective of the statute to prevent fraudulent, substandard, transient and unethical degree conferring schools from operating in the District but also from the Commission's use of local reputable institutions offering similar programs as a reference point. Greater specificity would not only be a practical impossibility, given the wide variety of educational programs and institutions the Commission must consider, but would infringe to a greater extent on legitimate educational choices. Finally, the potential for discriminatory or unconstitutional application of these standards is lessened by the procedural protections accorded to applicants under the statute and regulations. "No statute bears an absolute guarantee that it will always be applied within constitutional bounds; consequently, no such guarantee can be demanded." *Secretary of State of Maryland v. Joseph H. Munson Co., supra*, 104 S. Ct. at 2857 (Rehnquist, J., dissenting). At this stage we are not prepared to hold that the imprecision of these terms jeopardizes the entire statute. "Although it is possible that specific applications...may engender concrete problems of constitutional dimension, it will be time enough to consider such problems when they arise." *Joseph E. Seagram & Sons v. Hostetter, supra*, 384 U.S. at 52 (1966).

VI

The final question we address is whether the Commission's decision to deny Nova a license was error under D.C. law. The Commission's denial was based on its conclusion that Nova did not meet the District's requirements for adequate full time faculty and adequate library resources as set out in relevant part below:

> That considering the number and character of courses offered, the faculty is of reasonable number and properly qualified, and that the institution is possessed of suitable...library equipment.

D.C. Code § 29-815(4).

> There shall be a sufficient number of full-time teaching appointments to ensure continuity and stability of the educational program, as well as to provide adequate educational association between students and faculty.

Regulations § III(4)(b).

> The collection of books periodicals, newspapers, ..., shall be adequate for the needs of the educational programs of the institution, and shall be readily accessible to the faculty and the students. Provisions shall be made for the continuous acquisition of current library materials and for the recording of all library holdings.

Regulations § III(8)(a)(b).

The facts upon which the Commission rested its conclusion that Nova did not meet the District's library and faculty standards are essentially undisputed.[13] As to library facilities, the Commission found that Nova had no library in the District of Columbia and no plans to establish one. Rather, Nova arranged with George Mason and Howard Universities to have their libraries available for Nova's students, and intended to rely on existing public and governmental institutions in the District.

As to faculty resources, the Commission found that Nova's faculty for the DPA program consisted of nine full-time Florida members and 33 part-time national faculty members (preceptors) for a projected 15 clusters, or approximately 380 students. The Florida faculty provides 50% of the DPA instruction as well as teaching in other departments and performing administrative duties. The turnover rate among the Florida faculty was 50% between August 1981 and August 1982. As we have previously stated, the preceptors, who contract with Nova to teach specific courses at the various clusters, are scholars prominent in the public administration field. Each cluster, consisting of 20-25 students, is coordinated by a cluster director, who is a part-time contractor, paid monthly by Nova under a three-year contract, and generally employed in a full-time position elsewhere. Cluster directors administer comprehensive examinations, arrange and assist in cluster sessions, counsel students, and assist the faculty in research and reading of student papers. Other than the contract students have with preceptors and cluster directors during weekend teaching sessions, contact is by special appointment, telephone and written communication.

Based upon these findings, the Commission concluded that Nova did not meet the District's requirements for adequate full-time faculty and library resources. The Commission interpreted the statute and regulations as requiring Nova to satisfy the District's faculty requirements independently of Nova's staff at its principal institution in Florida and as requiring Nova to provide its own library. On the basis of these deficiencies, the license was denied. This denial was without prejudice to Nova renewing its application and the Commission offered to advise Nova as to how Nova could meet these requirements.

Nova does not dispute the factual findings upon which the Commission based its conclusion, but argues that the Commission's conclusion was wrong -- that in fact Nova did meet the District's requirements and that the Commission's conclusion that Nova must meet faculty requirements in the District independently of its faculty resources elsewhere and must establish its own library was an unreasonable and erroneous interpretation of the statute and regulations.

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[13] The record suggests that the Commission also concluded that Nova did not meet District standards related to clear delineation of administrative control. We do not address this question in that the Commission's decision is supported by its conclusions regarding library and faculty requirements. We need not consider whether resting our holding on only two of the three prongs relied upon by the Commission should cause us to consider remanding to the Commission because at oral argument Nova specifically rejected any possible remand remedy.

This court does not undertake a de novo review of the record in an administrative proceeding. E.g., *Pendleton v. District of Columbia Board of Elections and Ethics*, 449 A.2d 301, 307 (D.C. 1982). Rather, we examine the record to determine whether the conclusion is reasonable, and based on "reliable, probative, and substantial evidence" of record. *Id.* at 304 (citing D.C. Code § 1-1509 (e) (1981)). "Substantial evidence is more than a mere scintilla [of evidence]; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Jameson's Liquors, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 384 A.2d 412, 418 (D.C. 1978) (citations omitted) (quoting *The Vestry of Grace Parish v. District of Columbia Alcoholic Beverage Control Board*, 366 A.2d 1110 (D.C. 1976)). Moreover, when an agency's decision is based on an "interpretation of the statute and regulations it administers, [that interpretation] will be sustained unless shown to be unreasonable or in contravention of the language or legislative history of the statute." *DeLevay v. District of Columbia Rental Accommodations Commission*, 411 A.2d 354, 359 (D.C. 1980) (citations omitted). We hold in this case that the Commission's denial was based on substantial evidence and was reasonable and consistent with the language and purpose of the statute.

The record reflects that the Commission's concern was that none of Nova's faculty, full-time or otherwise, was consistently present in the District of Columbia. Considerable evidence was presented during the hearing regarding the importance in doctoral programs of face-to-face interaction between faculty and students, particularly for supervision and counseling during research projects. Not only was student-faculty interaction significantly reduced by the lack of any Nova faculty in the District, but evidence suggested that Nova's nine DPA faculty members in Florida could not provide adequate supervision and continuity in that they were non-tenured, subject to high turnover rates, and had significant responsibilities outside the DPA program. And despite the recognized excellence of Nova's preceptorial faculty, these teachers had only limited contact with students. Under these circumstances, the Commission's conclusion that Nova must satisfy faculty requirements in the District independently of its faculty in Florida was not unreasonable, and its conclusion that Nova's plans did not provide for sufficient full-time faculty to assure adequate interaction between faculty and student and continuity and stability in the overall program was supported by substantial evidence.

Nor do we believe that the Commission's conclusion that Nova did not meet the District's requirements for adequate library resources was unsupported by substantial evidence or erroneous as a matter of law. D.C. Code § 29-815(4) requires degree-conferring institutions to "possessed of suitable...library equipment." The *Regulations* require, inter alia, an adequate "collection of books" and "continuous acquisition of current library materials." *Regulations* § III(8)(a)(b). The Commission reasonably interpreted this language as requiring educational institutions to establish their own libraries, rather than rely on the public or private libraries otherwise available in the District or suburbs of the District. This interpretation is consistent not only with the language but with the purpose of the statute in that it ensures that an educational institution has materials appropriate to the degree program as well as library hours that meet student needs and assures some degree of stability and continuity due to the substantial investment it requires from an institution. Of course, the Commission has the discretion to waive this as well as other requirements when it believes the requirement is inapplicable or unnecessary in particular cases. However, we cannot say that the Commission's failure to do so in this case was irrational or not based on substantial evidence. Not only were Nova's arrangements with Howard and George Mason Universities contrary to the express mandate of the statute and regulations, Nova's arrangements did not ensure that the purposes of this requirement would be met. As the Commission points out, George Mason and Howard University do not have doctoral programs in public administration and Nova would have no control over their acquisitions; the arrangements have no guaranty of permanence because any of the schools could revoke the agreements; and Nova is not committed to an investment that would encourage stability and permanence of their program in the District.

Finally, we cannot say that the Commission erred in its conclusion that the library and faculty deficiencies in Nova's program justified denying Nova a license. In this regard, we note that in denying Nova a license the Commission is not holding that Nova's program is in fact substandard, but rather that certain deficiencies present an unacceptable risk that the program will be "substandard" or "transient" or will result in the conferral of "false or misleading" degrees. D.C. Code § 31-1601 (1), (2) (1981). Given the complete lack of faculty and library resources in the District, who hold that the Commission's decision was justified by the evidence and in accord with the law.

Affirmed.

Notes and Questions

1. In an earlier case involving Nova's external degree program, Nova emerged victorious. See *Nova University v. Board of Governors of University of North Carolina*, in *LHE*, § 6.4., pp. 691-692. What is the difference between the two cases?

2. If you had been an educational consultant to the D.C. Licensure Commission, would you have advised that Nova should be denied a license to operate in D.C.? Why or why not? In this capacity, how would your reasoning process and the factors you would consider differ from the court's reasoning process and the factors it considered?

3. Were the decisions of the D.C. Commission or the court influenced by a narrow or traditional view of appropriate educational practices or delivery systems? Might the court's decision have an undue inhibiting effect on innovation in higher education?

SECS. 6.2. & 6.4. State Provision of Public Postsecondary Education
and
State Regulation of Out-of-State Institutions.

Problem 15

TVU is a newly-created academic unit of Adams State University, a public four-year university located in a state with a coordinating board for public institutions which is empowered to approve new academic programs offered by both public and private institutions. Adams State offers baccalaureate degrees and graduate degrees. Through TVU, Adams has begun offering baccalaureate and master's-level courses at the locations of several large corporations in the state, and has designed some new programs at the request of these corporations to fit the needs of their employees more closely. Furthermore, Adams is offering courses leading to degrees in neighboring states through two-way interactive video. Students from these states may travel to one of several hotels where Adams has set up the interactive video equipment in these states.

The legislature in the state in which Adams is located has learned of its distance learning activities, and has demanded an accounting of the funds spent, income received, and whether any out-of-state students have been educated at the cost of in-state taxpayers. It also wants to know if Adams is charging out-of-state tuition to the students involved in interactive video, and whether any public funds are being spent to provide courses for the corporations' employees. Officials in the states where Adams conducts interactive video programs have also begun to ask questions about these programs

What governance and control issues are pertinent here? Would your answer depend on knowing whether Adams State is constitutionally- or statutorily-based? Do the states in which the students are receiving the interactive video have the authority to require Adams to seek approval to offer courses in their states? What legal sources would you need to consult to begin answering these questions?

SEC. 6.5. Other State Regulatory Laws Affecting Postsecondary Programs.

Red & Black Publishing Co., Inc. v. Board of Regents
262 Ga. 848; 427 S.E.2d 257 (1993)

OPINION BY: HUNT

The *Red & Black*, the student newspaper of the University of Georgia,[1] brought this action for injunctive relief against the Board of Regents, Charles Knapp as President of the University of Georgia and others,[2] seeking access to records and disciplinary proceedings of the student Organization Court of the University of Georgia.[3] The trial court held the newspaper had a right of access to the records under the Open Records Act, OCGA § 50-18-70 et seq., but not to the proceedings under the Open Meetings Act, OCGA § 50-14-1 et seq.

* * * *

Both sides appeal. We affirm the trial court's ruling allowing access to the Organization Court's records; however, we reverse the trial court's order regarding the Organization Court's proceedings because we conclude those proceedings are subject to the Open Meetings Act.

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[1] Also named as a plaintiff is Jennifer Squillante, the Editor-in-Chief of the *Red & Black*.

[2] The named defendants are the Board of Regents of the University System of Georgia, Charles Knapp, in his capacity as President of the University of Georgia, and William B. Bracewell, in his capacity as Director of the Office of Judicial Programs of the University of Georgia.

[3] The suit was instigated after the newspaper was denied access to Organization Court records and proceedings involving hazing charges against two fraternities.

1. The Organization Court

To determine whether the Organization Court is subject to the Open Records and Open Meetings Acts, we look first to the nature of that court and its relationship to the Board of Regents and the University of Georgia.

As noted by the trial court, the Board of Regents and its universities are state agencies or bodies for purposes of Georgia's Open Records and Meetings laws *Board of Regents v. Atlanta Journal*, 259 Ga. 214 (1) (378 S.E.2d 305) (1989)....The Board of Regents governs the University of Georgia and delegates to the University the formulation of rules and regulations concerning the discipline of students and student social organizations. The University created the Office of Judicial Programs to handle discipline of students and student social organizations.[4] That office provides "training for the [student] justices, to aid in the administration of the courts, and to coordinate the future development of judicial bodies and hearing boards on campus."

The Student Judiciary hears and adjudicates alleged violations of University rules and regulations.[5] The Student Judiciary is divided into five different student courts: Traffic Court, Campus Court, Main Court, Pharmacy Court, and Organization Court. Students serve as justices on the courts, and court sessions are held on the University of Georgia campus. Staff of the Office of Judicial Programs (employees of the University) provide secretarial and administrative support for the student courts. All student records are housed in the Office of Judicial Programs.

The Organization Court hears and adjudicates cases involving alleged University rule and regulation violations on the part of fraternities and sororities.[6] Five student justices of the

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[4] Rules of Procedure & Regulations of the Student Judiciary.

[5] Rule 3 of the Rules of Procedure and Regulations of the Student Judiciary provides:

> The courts of the Student Judiciary function in order to establish the facts of a case, determine whether a University Regulation has been violated, and, if the student-defendant is found guilty to assess an appropriate penalty for each violation ....

[6] Rule 9 of the Rules of Procedure and Regulations of the Student Judiciary provides:

> Organization Court has jurisdiction over all cases which are assigned to it by the Office of Judicial Programs. Such jurisdiction shall extend to any offenses which may result in revocation, probated revocation, suspension, or probated suspension of the

Organization Court must be present for that court to hold a hearing and to determine the appropriate disciplinary measures, with three votes necessary to find a defendant organization guilty. Hearings of the Organization Court are closed to the public at the request of the defendant organization.

Specific University regulations pertaining to student organizations include prohibitions against: damage to property, disorderly conduct, alcohol and drug misuse, unauthorized entry, gambling, and hazing. The Organization Court, if it determines a student organization regulation has been violated, may impose the following sanctions: recommendation for charter revocation; revocation of University registration; suspension; restriction; probation; oral reprimand; written reprimand; and community service. The Organization Court "may enlarge upon or modify this list to meet the particular circumstance in any case."[7] Fraternities and sororities are subject to the jurisdiction of the Office of Judicial Programs and the Organization Court throughout the year.

2. The Open Records Act

Georgia's Open Records Act defines "public records," in pertinent part, as:

> all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, or similar material prepared and maintained or received in the course of the operation of a public office or agency. "Public records" shall also mean such items received or maintained by a private person or entity on behalf of a public office or agency which are not otherwise subject to protection from disclosure.

OCGA § 50-18-70 (a). The purpose of the Act is not only to encourage public access to such information [so]...the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions, but also to foster confidence in government through openness to the public. *Athens Observer v. Anderson*, 245 Ga. 63, 66 (263 S.E.2d 128) (1980).

The defendants concede, as they must, that the records of the Organization Court are "public records" that, unless exempted, are subject to inspection by the general public under the Open Records Act. *Board of Regents v. Atlanta Journal, supra*; *Macon Telegraph Pub. Co. v. Bd. of*

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organization's registration with Student Activities....

[7] University of Georgia Conduct Regulations and Procedures to be Followed in Disciplinary Hearings, Student Organization regulations.

Regents, 256 Ga. 443 (350 S.E.2d 23) (1986). However, they contend that the records are specifically exempted by virtue of OCGA § 50-18-72(a), which provides that public disclosure is not required for records:

> (1) Specifically required by the federal government to be confidential;
>
> (2) Medical or veterinary records and similar files, the disclosure of which would be an invasion of personal privacy.

The defendants argue that both the above exemptions are triggered by the federal Family Educational Rights and Privacy Act, 20 USC § 1232g, commonly known as the "Buckley Amendment."[8] We disagree.

First, we have serious questions whether the Buckley Amendment even applies to the exemptions argued by the defendants, since the Buckley Amendment does not prohibit disclosure of records. Rather, as noted by the trial court, the Buckley Amendment provides for the withholding of federal funds for institutions that have a policy or practice of permitting the release of educational records. *Student Bar Assn. Bd. of Governors v. Byrd,* 239 S.E.2d 415, 419 (N.C. 1977); *Tombrello v. USX Corp.*, 763 F.Supp. 541, 545-546 (N.D. Ala. 1991); *Bauer v. Kincaid*, 759 F.Supp. 575, 589

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[8] The Buckley Amendment provides, in pertinent part:

> (b) (1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information...) of students without the written consent of their parents to any individual, agency, or organization....20 USC § 1232g (b) (1). * * *
>
> (b) (2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless . . . * * *
>
>> (B) Such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders

or subpoenas in advance of the compliance therewith by the educational institution or agency. 20 USC § 1232g (b) (2) (B).

(W.D. Mo. 1991). Also, we look to the Buckley Amendment's purpose, which was not to grant individual students the right of privacy or access to educational records, but to control the careless release of educational information on the part of many institutions. *Id.* at 590; *Smith v. Duquesne University*, 612 F.Supp. 72, 80 (W.D. Pa. 1985).

However, assuming, without deciding, that the threat of withdrawal of federal funding is equivalent to a prohibition of disclosure (as the defendants argue), we do not believe the documents sought are "education records" within the meaning of the Buckley Amendment.[9] The documents at issue involve charges of violations of University rules and regulations -- specifically, in this case, hazing charges -- against social fraternities. While the records in question are similar to, they are not the same as, those "maintained solely for law enforcement purposes," which are expressly excluded from the Buckley Amendment's purview. See *Bauer v. Kincaid, supra*. Nevertheless, the records are not of the type the Buckley Amendment is intended to protect, i.e., those relating to individual student academic performance, financial aid, or scholastic probation.[10] *Id.* at 591. Further, as noted by the trial court, the Organization Court records are maintained at the Office of Judicial Programs, while "education records" are maintained at the Registrar's Office.

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[9] "Education records" are defined in the Buckley Amendment as:

> (4) (A) Except as may be provided otherwise in subparagraph (B), those records, files, documents, and other material which
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> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.
>
> (B) The term "education records" does not include
>
> (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;
>
> (ii) if the personnel of a law enforcement unit do not have access to education records under subsection (b) (1) of this section, the records and documents of such law enforcement unit which
>
> (I) are kept apart from records described in subparagraph (A),
>
> (II) are maintained solely for law enforcement purposes, and
>
> (III) are not made available to persons other than law enforcement officials of the same jurisdiction;...20 USC § 1232g (a) (4) (B).

Moreover, the Buckley Amendment specifically provides that the sanction of loss of federal funding does not occur when the institution furnishes information in compliance with a judicial order. 20 USC § 1232g (b) (2) (B), fn. 8, *supra*; *State v. Birdsall*, 568 P2d 1094, 1097 (Ariz. 1977); *Rios v. Read*, 73 F.R.D. 589, 598 (E.D. N.Y. 1977). Thus, because the trial court ordered the records released, the Buckley Amendment cannot trigger either of the exemptions argued by the defendants.

For the foregoing reasons, we conclude the trial court correctly determined the Organization Court records to be subject to the Georgia Open Records Act.

3. The Open Meetings Act

The Georgia Open Meetings Act ("Government in Sunshine Law") provides that "all meetings ...shall be open to the public," OCGA § 50-14-1 (b), and applies to "[e]very state department, agency, board, bureau, commission, and authority." OCGA § 50-14-1 (a) (1) (A). "Meetings" are defined under the Act as the gathering of a quorum of the members of the governing body of an agency or of any committee of its members created by such governing body...at a designated time and place at which official business or policy of the agency is to be discussed or at which official action is to be taken....OCGA § 50-14-1 (a) (2).

The Act was enacted in the public interest to protect the public -- both individuals and the public generally -- from "closed door" politics and the potential abuse of individuals and the misuse of power such policies entail. *Atlanta Journal v. Hill*, 257 Ga. 398, 399 (359 S.E.2d 913) (1987). We have held that "the Act must be broadly construed to effect its remedial and protective purposes." *Id.*

By the Act's express language, the test for its applicability is two-pronged: first, is the meeting one of a "governing body of an agency" or any committee thereof?; and second, is the meeting one "at which official business or policy of the agency is to be discussed or at which official action is to be taken[?]"

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[10] The trial court in this instance conducted an in camera review of the documents regarding the hazing charges, and specifically found nothing related to the academic settings, such as grades, test and aptitude scores or financial aid. Indeed, one hazing charge involved an alleged battery against a student which had been investigated by the local police.

(a) It cannot seriously be contended that the Organization Court does not meet the second prong of the test. That is, it meets to take official action on behalf of the University and the Board of Regents. As noted above, the Organization Court exists and derives its authority to enforce University rules and regulations concerning social fraternities and sororities directly from the Board of Regents. The Board of Regents delegated to the University the formulation of rules and regulations regarding discipline of students and student social organizations. The University, in turn, created the Office of Judicial Programs to handle discipline of students and student organizations. The Organization Court has jurisdiction over all cases assigned to it by the Office of Judicial Programs. Its sessions are held on the University of Georgia campus, it is funded by University funds, and it is served administratively by staff members of the Office of Judicial Programs, University employees. The Organization Court's very function is to determine whether a social fraternity or sorority is guilty of violating University rules and regulations. Indeed, it adjudicates claims of serious misconduct, some of which constitute criminal activity under state law.[11] The Organization Court's decisions and sentences are not advisory in any sense, compare *McLarty v. Bd. of Regents, supra,* but are final and binding unless reversed on appeal.[12]

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[11] E.g., damage to property, theft, alcohol and drug misuse, unauthorized entry, and hazing. See OCGA § 16-5-61. In fact, the trial court found that one of the hazing charges in this case involved an alleged battery against a student which had been investigated by the local police.

The court is run by formal procedural rules, similar to those of trial courts, including: the right to counsel for the defendant, filing of pleadings, notice of hearings, presentation of witnesses under oath, right of cross-examination, burdens of proof (the defendant is presumed innocent and must be proven guilty by clear and convincing evidence), and appeals. Student justices are subject to a code of ethics consisting of ten canons.

The Organization Court's hearings are quite similar to those in criminal cases. We note our state's strong policy against secret criminal trials. Indeed, our constitution requires that criminal trials be public. *Constitution of Ga.* 1983, Art. I, Sec. I, Par. XI. See also *R. W. Page Corp. v. Lumpkin,* 249 Ga. 576 (292 S.E.2d 815) (1982).

[12] A defendant organization may appeal an Organization Court decision first to the Student Judicial Council, which is made up of seven students, then to the vice-president for Student Affairs, then to the president of the university, and finally, to the Board of Regents (the last level of appeal is a matter of discretionary review). In fact, witnesses for the state indicated that very few Organization Court decisions are appealed.

(b) The defendants contend, and the trial court held, that the Organization Court is not a "governing body of an agency" or any committee of the members thereof within the meaning of the Act. It is true that the Organization Court does not fit within the literal language of the Act in that it is not a committee of any members of the governing body, i.e., the Board of Regents or the University. Nevertheless, the Organization Court stands in the place of, and is equivalent to the Board of Regents and the University under the Open Meetings Act. The Organization Court, acting with the Office of Judicial Programs, is the vehicle by which the University carries out its responsibility, as directed by the Board of Regents, to regulate social organizations.[13] Simply put, having delegated official responsibility and authority to the Organization Court, the defendants cannot hide behind meetings at which official action is taken on their behalf, and for which they are responsible, by contending that a group of students, none of whom are members of the Board of Regents, is taking that action.

We are mindful that openness in sensitive proceedings is sometimes unpleasant, difficult, and occasionally harmful. Nevertheless, the policy of this state is that the public's business must be open, not only to protect against potential abuse, but also to maintain the public's confidence in its officials. *Athens Observer v. Anderson, supra.*[14]

For the foregoing reasons, we hold that the trial court erred in concluding that the hearings of the Organization Court are not subject to the Open Meetings Act and can be held in secret.[15]

4. President Knapp

We agree with the plaintiffs that the trial court erred in dismissing President Knapp as a defendant. He is the executive head of the University of Georgia and its departments. By virtue of that position, and because of the Board of Regents' mandate that the University formulate rules and regulations pertaining to students and student social organizations, President Knapp necessarily is responsible for procedures involving those rules and regulations. Accordingly, he is a proper party defendant. See *Macon Telegraph Pub. Co. v. Bd. of Regents, supra*, 256 Ga. at 445.

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[13] The Organization Court is far different from most of the student groups on campus, e.g., glee clubs, language clubs, etc. The University would be unlikely to take any action if any of these groups disbanded. However, if the Organization Court were to abdicate its powers for any reason, the University would be required to step in to establish another method to regulate social organizations.

[14] In fact, there may be legitimate reasons for closing Organization Court hearings to the public. However, the authority for this, or any other exception to the Open Meetings Act must come from the General Assembly.

[15] The plaintiffs do not seek access to the deliberations of the Organization Court justices, which, of course, would not be open to the public, any more than would jury deliberations.

Judgment affirmed in Case No. S92X1112. Judgment reversed in Case No. S92A1111.

Notes and Questions

1. Note the court's rejection of the university's argument that the Family Educational Rights and Privacy Act (FERPA) forbids the release of information on campus judicial proceedings. For a discussion of FERPA, see *LHE* § 4.16.1... The FERPA regulations were amended subsequent to the opinion in this case and now permit disclosure of disciplinary records to certain parties.

2. Consider the administrative implications of the court's holding that disciplinary hearings are public meetings. What effect might such a holding have on the design and operation of these disciplinary systems? On the decision whether to permit students to be assisted by attorneys?

3. The university's student newspaper brought this lawsuit against the university. What are the tort liability risks for colleges and universities, with regard to defamation and invasion of privacy, if the student newspaper publishes a story based upon notes a reporter took at a disciplinary hearing? (See *LHE* §§ 2.3.1. and 4.13.4.)

4. Student affairs professionals have argued that the purpose of student disciplinary codes is educational rather than punitive. Will the specter of public hearings and the publication of disciplinary records chill the use of these systems to respond to student misconduct? How could an institution design a system to respond to misconduct without running afoul of state open records and open meetings laws?

G.

CHAPTER VII: THE COLLEGE AND THE FEDERAL GOVERNMENT

Introductory Note

Chapter VII in *LHE* focuses on a wide variety of regulatory issues. It covers dozens of laws, and the numerous cases discussed often focus on narrow or technical issues. For this *Supplement*, we have selected only two of the many cases falling within the bounds of chapter VII; one case deals with regulatory power and the other deals with the spending power. Both cases raise issues of broad significance. We have also included two problems addressing federal government issues that many colleges are facing or will face in the near future.

Readers desiring further examples should consult *LHE* sections 7.2.-7.5., and readers desiring additional information on monitoring and responding to federal legislation and administrative regulations should consult *LHE* section 7.6.

EEOC v. Mississippi College
626 F.2d 477 (5th Cir. 1980)

This case is set out on pp. 728-730 in *LHE*.

Notes and Questions

1. The complainant (Dr. Summers) argued that the college did not hire her for the position because she was female and the person hired was male. In contrast, the college argued that it did not hire Dr. Summers (in part) because she was not a Baptist and the person hired was a Baptist. What is the court's position on this question? In analyzing the application of Title VII to Dr. Summers' complaint, what difference does it make whether sex or religion is the basis of the college's hiring decision?

2. The court mentions that the college has a policy of hiring only men to teach courses in religion, and that this policy is predicated upon religious beliefs. Suppose in another case a disappointed applicant challenged this policy. Would your analysis of Title VII's applicability to this policy differ from your analysis of its applicability to a policy of preferring Baptists over non-Baptists? Would the establishment clause or free exercise clause apply any differently to this matter?

3. The Title IX statute (*LHE* § 7.5.3.) also covers employment discrimination (see *LHE* § 7.5.7.1.). If the college received federal funds, could Title IX have applied to Dr. Summers' sex discrimination claim? If the college declined to hire Dr. Summers because she was not a Baptist, how would that affect Title IX's applicability?

4. Would your analysis of Title VII's applicability to the college's policy of hiring only men to teach religion courses (ques. 2 above) differ from the analysis you would do of Title IX's applicability to that policy?

Problem 16

Mid-State University requires its faculty to conduct research and to publish books and articles as a condition of promotion and tenure. In fact, the faculty handbook states that research and publication is a requirement not only for promotion and tenure, but for favorable annual performance evaluations and salary increases as well. Mid-State gives faculty who are active researchers and publishers a two-course teaching load reduction.

Mildred Marks is a professor of creative writing who has written two volumes of short stories, neither of which have sold well but have garnered strong critical praise. For the last two years, she has been working on a novel and has been given the standard two-course teaching load reduction. Last month her novel was published, and it is already near the top of the New York *Times* best-sellers' list. Marks should receive royalties well above six figures for the book.

Upon hearing of her great success, the university president sent Marks a letter of congratulations and asked her to meet with the university attorney concerning the allocation of royalties between Marks and the university.

Does the university have a right to all or part of the royalties? What university documents and what legal sources would you consult in order to advise Marks or the University president on this question?

SEC. 7.4.5. Protecting Institutional Interests in Disputes with Funding Agencies.

Board of Trustees of the Leland Stanford Junior University v. Sullivan
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
773 F. Supp. 472
1991

HAROLD H. GREENE, UNITED STATES DISTRICT JUDGE

The principal legal issue in this lawsuit -- the extent to which the government may curtail the speech of a recipient of a government grant -- is related to that which was recently resolved by the Supreme Court in *Rust v. Sullivan,* 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991), a case involving abortion counseling in family planning clinics. This Court has carefully considered that decision as well as other, prior appellate law dealing with the issue in question and, in the context of pending cross-motions for summary judgment, it is resolving the dispute in favor of plaintiff Stanford University.

I

In August 1989 the National Heart, Lung, and Blood Institute (Institute) of the National Institutes of Health[2] issued a notice that it planned to award contracts for a five-year research project on an artificial heart device. The research was to be conducted at two separate academic institutions, each of which was to receive a government grant of approximately $ 1.5 million. The notice indicated that the contract might include a clause known as the Confidentiality of Information Clause (confidentiality clause) which would require researchers to obtain government approval before publishing or otherwise publicly discussing preliminary research results. In October 1989 Dr. Philip Oyer, a professor of cardiovascular surgery at Stanford Medical School, submitted a proposal on behalf of Stanford in response to the notice. Stanford's proposal objected to several provisions of the notice, particularly the confidentiality clause, and ultimately, when Stanford and the government could not agree with respect to the clause, the government withdrew the contract from Stanford and awarded it elsewhere.[3]

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[2] The National Institutes of Health are component parts of the Department of Health and Human Services, which is headed by Secretary Louis Sullivan.

Stanford argues that the confidentiality clause constitutes an illegal prior restraint and an unconstitutional condition on a government benefit.[4] The relief requested is a declaratory judgment that this clause is unconstitutional and an injunction requiring the Institute to re-award the contract to Stanford.

II

The confidentiality clause requires researchers to give the government advance notice of their intent to publish preliminary findings,[5] and it allows the government's contracting officer to block such publication.[6] More specifically, under the clause, a researcher must give forty-five days advance notice that he plans to publish preliminary findings. If the contracting officer objects to the publication, the researcher may file a written claim with him, and the contracting officer then has an additional sixty days in which to decide that claim. The contracting officer's ultimate decision is final and binding (except that the researcher may file suit in court). See 48 C.F.R. § 52.233-1.

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[3] In June 1990, the Institute sent the research contract -- which included the clause -- to Stanford for its concurrence. Stanford signed the contract, but it made its agreement to the contract contingent upon the "mutually satisfactory resolution" of several issues, including its objection to the confidentiality clause.

During July and August, Stanford negotiated with the Institute about the clause. At the end of August 1990, when no agreement could be reached, the Institute withdrew the contract from Stanford and a week later awarded it to St. Louis University Medical Center, which apparently did not object to the clause. There have been some delays with respect to the start of this research, and St. Louis University has not yet begun the human trials of the artificial heart device. The government agrees that a resolution of this case in favor of Stanford would not significantly injure St. Louis University or any other third party

[4] Stanford also argues that the clause was not authorized by statute, but the Court rejects that claim. While there is no statute specifically authorizing the actions taken or contemplated by the Institute, there is broad contracting authority which is adequate to constitute statutory sanction for the actions taken by the Institute. 42 U.S.C. § 241(a)(7).

[5] The information subjected to this prior government approval is defined as:

> information which might require special consideration with regard to the timing of its disclosure may derive from studies or research, during which public disclosure of preliminary unvalidated findings could create erroneous conclusions which might threaten public health or safety if acted upon.

48 C.F.R. § 352.224-70(b). The information is also referred to as "findings...which have the possibility of adverse effects on the public or the Federal agency." 48 C.F.R. § 352.224-70(f).

It is well established that under the law this procedure constitutes a prior restraint on speech in that it allows the government to suppress the dissemination of information in advance of publication.[7] Prior restraints are permitted "only in exceptional cases." *Near v. Minnesota*, 283 U.S. 697, 716, 75 L. Ed. 1357, 51 S. Ct. 625 (1931). "Any system of prior restraint...'comes to...Court bearing a heavy presumption against its constitutional validity.'" *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963)).

These principles apply to the kind of speech involved in this case. The most typical prior restraint cases involve political or artistic speech.

* * * *

It is equally settled, however, though less commonly the subject of litigation, that the First Amendment protects scientific expression and debate just as it protects political and artistic expression...*Miller v. California*, 413 U.S. 15, 34, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973); *Roth v. United States*, 354 U.S. 476, 484, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957); *United States v. U.S. District Court for Cent. Dist. of Cal.*, 858 F.2d 534, 542 (9th Cir. 1988).

The defendants now concede[8] that the government could not impose the kind of restraint

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[6] The confidentiality clause further prohibits disclosure of personal information about individual participants in the research study as well as of proprietary information. 48 C.F.R. § 352.224(a). Stanford does not contest the government's restrictions on these two types of confidential information, and they are not at issue in this lawsuit.

[7] It is immaterial that the restraint does not last forever. Even a restraint of speech for a limited period is inconsistent with the First Amendment. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971).

[8] * * * *

Equally unpersuasive is the defendants' claim that, inasmuch as the government could have hired scientists as employees, a diminution of the free speech rights of scientists affiliated with a contemplated by the regulation on scientists whose research is not paid for by a government grant or contract. The question before the Court therefore is whether the grant of public funds takes the present situation out of the category of impermissible suppression of speech.

III

Prior to the issuance by the Supreme Court of the decision earlier this year, the law regarding speech-type conditions attached to government grants was less than clear. Although there were factual differences among the cases which could be, and were, cited as responsible for the particular results reached in the various cases, it has become increasingly difficult to discern a principled rule applicable to all the various situations.

* * * *

In view of the confusion among the prior decisions, if for no other reason, it is most useful to concentrate on the holding and reasoning in the decision handed down earlier this year in Rust. Moreover, to the extent that prior decisions of the Supreme Court or the lower courts conflict with *Rust*, they have of course been expressly or impliedly overruled.

In *Rust v. Sullivan*, the Supreme Court upheld a regulatory restriction,[10] which prohibits health professionals in government-funded family planning clinics from discussing abortion with their patients. After referring to and analyzing the cases referred to above, the majority of the Supreme Court concluded that the restriction does not impinge on the First Amendment rights of these medical workers and that it is therefore valid. That of course is the law and this Court, like all lower courts, is bound thereby. There are, however, two bases upon which, under the *Rust* Court's own language, the *Rust* result does not follow here.

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university receiving government monies is less offensive to the law than it might otherwise be. *Id.* at 6 n. 5. Even assuming that the premise is correct, that kind of an argument could be made with respect to almost any activity, and its acceptance would in practice erode First Amendment freedoms on the widest scale.

[10] The restriction at issue was promulgated by the Secretary of Health and Human Services to implement Title X of the Public Health Service Act, 42 U.S.C. §§ 300 et seq. There was a question whether the regulation actually implemented the statute; see Justice Stevens' dissent, but the majority of the Court answered that question in the affirmative.

First. The Supreme Court made a sharp distinction between the denial of a benefit to an individual on account of his speech or expression (which is constitutionally prohibited) and an insistence that public funds be spent for the program purposes for which they were authorized (which the Constitution allows). Said the Court:

> The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X grantee and a Title X project...The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct these activities through programs that are separate and independent from the project that receives Title X funds.
>
> In contrast, our "unconstitutional conditions" cases involve situations in which the government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally-funded program.

111 S. Ct. at 1774 (emphasis in original) (citations omitted).

The regulations at issue in the instant case broadly bind the grantee and not merely the artificial heart project. Dr. Oyer and the other individuals working for Stanford on the project are prohibited by defendants' regulations from discussing preliminary findings of that project without permission. Unlike the health professionals in *Rust*, the Stanford researchers lack the option of speaking regarding artificial heart research on their own time, or in circumstances where their speech is paid for by Stanford University or some other private donor, or not paid for by anyone at all. Regardless of the circumstances, during the contract's five-year life[12] they may not speak about the project's results or its progress without the express prior permission from defendants' contracting officer.

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[12] The ban on discussing unvalidated findings may last longer than the five-year contract period, for if the government considers results to be "preliminary" and "unvalidated," it could bar publication even after the contract is over.

The Supreme Court's discussion in *Rust* which, notwithstanding the result reached there, specifically reaffirmed the unconstitutionality of speech-related restrictions applicable to recipients of government funds as such, compels the conclusion that the defendants' restrictions in the instant case lack constitutional validity. The regulation at issue here is not tailored to reach only the particular program that is in receipt of government funds; it broadly forbids the recipients of the funds from engaging in publishing activity related to artificial heart research at any time, under any auspices, and wholly apart from the particular program that is being aided.[13]

Second. Other language of the Supreme Court has a similar impact on the issues in this case. The Court recalled in *Rust* that it had previously "recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment." This explicit exception to the broader ruling in *Rust* is directly on point here. The plaintiff is of course a university. The subject of this lawsuit is the very free expression that the *Rust* Court held to be so important for the functioning of American society that it may be curtailed through conditions attached to grants or contracts only if these conditions are not vague or overbroad. Yet, the conditions imposed by the defendants are plainly in that category.

The regulations permit the contracting officer to prevent Stanford from issuing "preliminary unvalidated findings" that "could create erroneous conclusions which might threaten public health or safety if acted upon," or that might have "adverse effects on...the Federal agency." 48 C.F.R. § 352.224-70. In the view of this Court, these standards are impermissibly vague. Under what circumstances are preliminary findings regarded as "validated"? Who will decide whether the conclusions drawn by Stanford are erroneous -- the non-scientist contracting officer? What is meant by the phrase that a report "could" create erroneous conclusions? How would it be determined that such a conclusion "might threaten public health or safety," and to what degree of certainty would there have to be a threat to public health and safety? What kind of a threat? What would be regarded as an adverse effect "on the Federal agency?" Would such an effect have to be concrete, financial, reputational, or of some other nature? To pose these questions, and others that could be asked, is to reveal the vagueness of the standards.

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[13] Defendants' ban on preliminary reporting could not validly be defended on the basis that it is tied to the heart research program rather than the researchers, for the latter, as noted, would be precluded from speaking or publishing about artificial heart research even on their own time. Any attempt to examine such speech or publication with a view to determining whether or not the information came to these scientists as a consequence of their work on the federally-financed project or from their general familiarity with the subject would require such intrusive examination into thought processes that it could not conceivably be undertaken. It should be noted in this connection that Dr. Oyer has worked for almost twenty years on the development of a self-contained artificial heart device.

There is the related problem of the chilling effect of these vague and overbroad conditions. It is impossible for a grantee such as Stanford and its chief researcher Dr. Oyer to know what might be regarded as a violation of these amorphous standards. Because of the vagueness and subjectivity of the administrative regulation, a responsible grantee could be certain of not being in violation only if it refrained from publishing any preliminary findings not endorsed by the contracting officer. Thus, the qualifying phrases referred to above are not likely to effect any real diminution of the otherwise unfettered authority of the contracting officer, and no prudent grantee is likely to publish that which the contracting officer has not cleared even if the reasons for the refusal to clear appear to be wholly invalid.[17] In sum, this case fits snugly in the "free expression at a university" category that [the court] carved out of its general ruling on speech conditions attached to grants.

IV

Defendants' approach to this case is that, since public funds will be expended on the artificial heart research at issue here, the burden is on plaintiff Stanford University to explain why and under what circumstances it should be relieved of the obligation to submit its publications on this subject to the government for its prior approval. That approach views the issue from the wrong end of the telescope.

Stanford University, a premier academic institution, engaged in significant scientific and medical research for the benefit of the American people, is not ipso facto compelled under the law to surrender its free speech rights and those of its scientific researchers to a "contracting officer" merely because a regulation issued by defendants so directs. There exists, after all, the First Amendment to the Constitution, the supreme law of the land, which protects those very rights.

The Supreme Court decided in *Rust v. Sullivan* that when the government grants money to an institution or a program, it may under certain circumstances condition that grant upon curtailment of the program participants' rights under the First Amendment. Defendants' argument in this case is that that decision is applicable to government grants and contracts generally, without substantial limitation. The *Rust* decision opened the door to government review and suppression of speech and publication in areas which had theretofore been widely thought immune from such intrusion; the government's position in this case, if endorsed by the courts, would take that door off its hinges.

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[17] Indeed, under the regulation, the contracting officer may suppress a preliminary report on the basis of "any objections;" the objections need not be material, significant, or valid.

That position must be viewed in the context of the fact that few large-scale endeavors are today not supported, directly or indirectly, by government funds -- from the health care of senior citizens, to farm subsidies, to the construction of weaponry, to name but a few of the most obvious. Defendants' proposal would, at least potentially, subordinate the free speech rights of the participants in the programs receiving such federal monies to the government's wishes. To put it another way, if the Supreme Court decision were to be given the scope and breadth defendants advocate in this case, the result would be an invitation to government censorship wherever public funds flow, and acceptance by the courts of defendants' position would thus present an enormous threat to the First Amendment rights of American citizens and to a free society.

This Court, like all lower courts, is of course bound by the *Rust* decision. But for the reasons stated, the Court will not, without explicit appellate direction, further narrow the speech and expression rights of citizens and organizations, or subject to government censorship the publications of institutions of higher learning and others engaged in legitimate research. No such appellate direction has been given; on the contrary, as explained above, *Rust* is consistent with a decision to allow Stanford to use its own judgment on when and what to publish, notwithstanding that its research is supported with federal funds. The Court will accordingly issue an injunction which will have the effect of prohibiting defendants from interfering with the university's freedom to publish.

V

What remains to be decided is what relief is appropriate. Defendants argue that their Department should be given the opportunity "to resolicit the contract following appropriate procurement procedures." Motion to Dismiss at 32. However, it is plain that the contract would have remained with Stanford but for the illegal confidentiality clause. Under these circumstances, a court may order that the contract be awarded to the disappointed party without an additional round of procurement proceedings. *Delta Data Systems Corp. v. Webster*, 240 App. D.C. 182, 744 F.2d 197, 204 (D.C. Cir. 1984). The judgment being issued contemporaneously herewith therefore so provides.

Notes and Questions

1. For discussions of the various first amendment principles applied in this case, see *LHE* § 4.9.3. (prior restraints); *LHE*, § 3.5.1., pp. 272-273 (overbreadth and vagueness); and *LHE*, § 3.7.1, pp. 302-303(the *Keyishian* case and the chilling effect).

2. The court makes much of the fact that this grantee was a university. How important is that fact to the outcome? If the grantee had been a nonprofit hospital or research lab that was not affiliated with a college or university, would the result have been any different? Why might it be advisable to provide special protection for colleges and universities; what values would be promoted by such protection? Is there any warrant in the First Amendment for providing special constitutional protection to colleges and universities? See generally LHE § 3.7.1.

3. Certainly the federal government has legitimate interests in the validity and clarity of the findings from research conducted with federal funds, and these interests could be affected by premature public disclosure of research findings. In light of the *Stanford* case, are there any ways in which the government may protect these interests? How would you advise the head of a federal agency that makes numerous research grants to universities? (Note also the court's note 6 on other government interests in confidentiality.)

SECS. 7.2.16. & 7.5.4. Americans with Disabilities Act and *Section 504.*

Problem 17[*]

A public university, which receives federal financial assistance under various programs, is reviewing a new policy proposal relating to students who are deaf or hearing impaired. The proposal states that the university will provide hearing-impaired students with auxiliary aids such as note-takers or transcriptions of tape recordings of classes, but will not pay for "more costly" auxiliary aids such as sign-language interpreters unless the student demonstrates financial need. Under this policy, the university would, upon request, provide hearing-impaired students with a list of potential resources, agencies, and charities that may assist the student in meeting the cost of an interpreter. If the student is unable to acquire alternative financial assistance and qualifies for student financial aid, the university will provide the sign-language interpreter.

Notes and Questions:

1. What steps might hearing-impaired students take in order to challenge the university's policy once it is instituted? How might the concerns of a university support group that represents all hearing-impaired students differ from that of a single student who needs interpreter services?

2. Does the university's proposal satisfy the requirements of Section 504? What arguments could you make in support of, and in opposition to, the university's proposal?

3. May the university legally require students to initially seek alternative funding from non-university sources for interpreters?

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[*] With thanks to Allen Kropp, guest lecturer in the graduate school. George Washington University, who drafted the original problem from which this problem was adapted.

4. An incoming first-year student who is hearing impaired seeks to enter the university's nursing program. What factors may affect whether the university must provide a sign-language interpreter during the student's classes? See also *LHE* § 4.2.4.3.

5. Would your answer to any of these questions be different if you were analyzing them under the Americans With Disabilities Act?

H.

CHAPTER VIII: THE COLLEGE AND THE EDUCATION ASSOCIATIONS

SEC. 8.3. The College and the Accrediting Agencies.

Marjorie Webster Junior College, Inc. v. Middle States Assn. of C. & S. S., Inc.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
302 F. Supp. 459
1969

OPINION: SMITH, D.J.:

Plaintiff, Marjorie Webster Junior College, Inc., brings this action under the antitrust laws of the United States and specifically under the provisions of Section 3 of the Sherman Antitrust Act[1] and Section 16 of the Clayton Act.[2] Jurisdiction is invoked under the provisions of 28 U.S.C. § 1337 vesting original jurisdiction of actions involving the antitrust laws in the district courts of the United States and under Section 11-521 of the D.C. Code (1967 ed.). A second count seeks relief under the Constitution and the common law controlling the activities of private associations.

The case arises out of plaintiff's desire to obtain regional accreditation for the institution it operates in the District of Columbia. Defendant has refused to evaluate the merits of plaintiff's educational program for accreditation, basing its refusal upon defendant's rule of eligibility which provides that to be considered for evaluation for accreditation an institution must be a nonprofit organization with a governing board representing the public interest.

Marjorie Webster Junior College (herein Webster) is a proprietary corporation organized in 1927 for educational purposes under the District of Columbia law (D.C. Code § 29-601, 1967 ed.). All of the stock is held by members of the Webster family. Since incorporation it has operated in the District of Columbia as a junior college for women with courses in seven departments, including a department of Liberal Arts. It offers both terminal and transfer courses. Most students who take terminal courses seek no additional formal education after graduation. The transfer courses, however, are designed for students who desire to continue their education by transferring with credits earned at Webster to other institutions offering four year courses. Plaintiff was accredited by the District of Columbia Board of Education pursuant to D.C. Code § 31-120 (1967 ed.) in 1947 and has awarded the degree of Associate in Arts to approximately 2,300 graduates who have satisfactorily completed the prescribed course of study.

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[1] 15 U.S.C. § 3.

[2] 15 U.S.C. § 26.

Middle States Association of Colleges and Secondary Schools, Inc. (herein Middle States) is a nonprofit educational corporation chartered under the laws of the State of New York on May 27, 1966 for the improvement and development of educational institutions, relationships and services. Its predecessor was Middle States Association of Colleges and Secondary Schools, an unincorporated nonprofit association established in 1887. Defendant conducts a program of evaluation and accreditation of institutions of higher and secondary education located in New York, New Jersey, Pennsylvania, Delaware, Maryland, the District of Columbia, Puerto Rico, the Canal Zone and the Virgin Islands. Middle States, one of six nationally recognized regional accrediting associations, prepares and maintains a list of accredited institutions of higher education, which is published and given national distribution by the American Council on Education.

Accreditation is the process whereby an association or agency recognizes an institution as having met certain predetermined standards. The process as employed by defendant involves establishment of standards of quality and identification of those institutions which have achieved them. It seeks to determine in broad qualitative terms whether an institution has clearly defined and appropriate objectives, whether it has established conditions under which it can reasonably be expected to attain them and whether it appears to be attaining them and may be able to continue to do so. The process involves self-evaluation by the institution, evaluation by a visiting team drawn from Middle States' membership, and action upon the report of that team by the Commission on Institutions of Higher Education. Institutions identified as meeting and maintaining announced standards appropriate to the educational activities in which they are engaged are accredited. Membership in Middle States is concomitant with accreditation by the Commission on Institutions of Higher Education or the Commission on Secondary Schools.

Defendant's membership includes 346 non-profit institutions of higher education (universities, colleges, junior colleges and specialized institutions). Approximately 106 of these institutions are state or municipal universities, colleges or junior colleges; 83 are private non-sectarian institutions, 137 are private church related or controlled universities, seminaries or junior colleges; 15 are specialized institutions with concentrated courses of instruction in music, optometry, pharmacy and textiles, one is a special private institution for the deaf, three are federally-sponsored military academies and one is a federally-sponsored junior college. The membership also includes certain institutions outside the United States assigned to Middle States by agreement among the regional associations.

In 1964 the Commission on Institutions of Higher Education of Middle States, the Commission on Institutions of Higher Education of the New England Association of Colleges and Secondary Schools, Inc., the Commission on Colleges and Universities of the North Central Association of Colleges and Secondary Schools, Inc., the Commission on Higher Schools of the Northwest Association of Secondary and Higher Schools, the Commission on Colleges of the Southern Association of Colleges and Schools, Inc., and the Accrediting Commission for Senior Colleges and Universities and the Accrediting Commission for Junior Colleges of the Western Association of Schools and Colleges established the Federation of Regional Accrediting Commissions of Higher Education (herein the Federation) to represent the six accrediting agencies in matters of common interest, to establish policies and procedures, and to exchange information, experience, and personnel. At its initial meeting in March 1964 the Federation issued a policy statement on eligibility for accreditation. One of the six eligibility criteria was the requirement that "The institution should be a nonprofit organization with a governing board representing the public interest."

Plaintiff contends that defendant and its members have formed a combination or conspiracy in restraint of the plaintiff's trade in the District of Columbia in violation of Section 3 of the Sherman Act . It alleges that this combination or conspiracy results from the combining of the members into an association which has acquired monopoly power over regional accreditation in this area and is unreasonably exercising this power in such manner as to prevent or inhibit competition from proprietary institutions. Plaintiff claims that many accredited senior colleges and universities have rejected and will continue to reject transfer applications and credits from Webster graduates and that it is handicapped in its recruitment of high school graduates because of its lack of Middle States accreditation. Plaintiff contends that it fulfills all the criteria for accreditation and membership except the nonprofit requirement and that defendant's exclusionary policy is unreasonable per se.

The second count in the amended complaint alleges that the accrediting function as practiced by defendant is so inherently governmental in nature that its actions are state actions in a constitutional sense subject to the restraint of due process and that the defendant has acted in an arbitrary, discriminatory and unreasonable manner in rejecting plaintiff's application. Plaintiff alleges that membership in the defendant association is necessary if Webster is to continue successfully as an institution of higher education. It contends that defendant's power is subject to judicial control and must be exercised in a reasonable fashion so that a licensed institution may function to serve the public interest in education.

Webster seeks a permanent injunction enjoining defendant, its officers, trustees, agents, and employees and all persons and organizations acting in concert with it from denying plaintiff eligibility for evaluation and accreditation solely because of its proprietary character and ordering Middle States to accept plaintiff's application for evaluation and to accredit plaintiff if it otherwise qualifies under defendant's standards. Webster also seeks a decree of the court declaring illegal, null and void defendant's requirement that institutions of higher education be "nonprofit organizations with a governing board representing the public interest" to be eligible for evaluation and accreditation by defendant.

Defendant, inter alia, contends that higher education is not trade or commerce within the regulatory ambit of the Sherman Antitrust Act. Middle States avers that its policy with regard to proprietary institutions is in no way motivated by the desire to protect its members from economic competition from such institutions and that no combination or conspiracy in restraint of trade exists. It denies that it has conspired to eliminate or suppress the competition of proprietary institutions. Defendant admits that accreditation by it is of importance to institutions of higher education but denies that its accreditation is essential to continuing a successful operation of such an institution. If the Sherman Act is applicable, Middle States contends that its actions have been entirely reasonable and completely within the public interest.

With reference to count two, defendant asserts that it is a voluntary membership organization which has the right to set up its own membership criteria. It claims that it was not organized at the request or under the aegis of any governmental agency. Middle States denies that it is exercising a function ordinarily exercised by a government authority in the United States. Even assuming Middle States to be a quasi-governmental agency, defendant avers that its refusal to consider Webster's application for membership is not arbitrary and unreasonable justifying judicial intervention. Middle States further contends that plaintiff has sustained no legally cognizable damage and has no standing to bring this action.

* * * *

A new and pivotal question here for determination is the applicability of the anti trust laws to the field of education. Is higher education, including the accreditation of institutions, trade or commerce and thus within the regulatory scope of the Sherman Act? Defendant contends that the legislative history of the Act demonstrates that it was intended to apply to the commercial world and not to the professions. Middle States emphasizes that the law was designed to break up the large trusts formed after the Civil War and to promote competition....Denying that it is engaged in commercial activities, defendant cites the traditional definition of "trade" contained in *The Schooner Nymph*, 1 Sumn. 516, 18 Fed.Cas. 506, No. 10,388 (1834):

> Whenever any occupation, employment, or business is carried on for the purpose of profit, or gain, or livelihood not in the liberal arts or in the learned professions, it is constantly called a trade. Middle States asserts that "trade" has never been interpreted by the courts to extend to non-commercial activities such as the learned professions into which category it should be placed.

In the first American Medical Association (herein AMA) decision, *United States v. American Medical Association et al.*, 72 App. D.C. 12, 110 F.2d 703 (1940), the United States Court of Appeals for the District of Columbia comprehensively reviewed the genesis and legal development of the word "trade" and held that the term as used in the Sherman Act included the medical profession. Chief Judge Groner concluded that the effect of all the English and American cases was "to enlarge the common acceptation of the word 'trade' when embraced in the phrase 'restraint of trade' to cover all occupations in which men are engaged for a livelihood."

In the second AMA case, *American Medical Association v. United States*, 76 U.S.App.D.C. 70, 130 F.2d 233 (1942), the Court of Appeals again included the medical field in the meaning of the word "trade" in the antitrust context. The Court held that Group Health Association, the organization which had been the victim of the AMA restraints, was clearly engaged in trade or commerce even though it was a nonprofit organization. It also found that hospitals in the District of Columbia -- some charitable, some nonprofit, some proprietary -- were engaged in trade and commerce within the meaning of the Sherman Act. (76 U.S. App. D.C. at 74-75). The Court said at p. 74, "It is not necessary, in order to constitute trade or business, that it shall be carried on for profit," citing *Hazen v. National Rifle Ass'n.*, 69 App.D.C. 339, 345, 101 F.2d 432, 438 (1938).

The myriad financial considerations involved in building programs, teachers' salaries, tuitions and miscellaneous operating expenses attest to the commercialization which necessarily exists in the field of higher education. Despite the opposition of many educators, there has been a recent trend toward the organization of faculty members to bargain collectively for better salaries and other benefits. Many institutions rent dormitory rooms and operate dining halls, book stores and other service facilities. Also there is a commercial aspect to the sharp competition for government and private contracts and the quest for research grants. In 1967-68 institutions of higher education expended more than 17 billion dollars. The projection for the year 1976-77 is 41 billion.[4] Higher education in America today possesses many of the attributes of business. To hold otherwise would ignore the obvious and challenge reality.

Webster rightly contends that attention should be focused on its activities rather than the defendant's because the question is not whether the defendant association is engaged in trade but whether plaintiff's trade has been restrained. The Supreme Court held in the third AMA case that when the organization at which the restraint is directed is in trade, it is immaterial whether the offending association is so engaged. *American Medical Association v. United States*, 317 U.S. 519, 528, 529, 87 L. Ed. 434, 63 S. Ct. 326 (1943). Webster is a corporation engaged in business for profit. Its corporate activity consists of offering educational facilities and services in exchange for the tuition charged students. The income received is spent for faculty salaries, maintenance of buildings, equipment and grounds, and board for students. Webster pays all taxes, such as income, property, sales and payroll, customarily paid by business corporations. Middle States can hardly deny that plaintiff is engaged in trade since the plaintiff's proprietary character is the reason for the membership exclusion and the sine qua non of this proceeding.

The specific section of the Sherman Act upon which count one is based provides:

> Every contract, combination in form or trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal....(15 U.S.C. § 3) .

Plaintiff does not contend that the members of Middle States conspired specifically to restrain its trade nor that the six regional associations formed the Federation for that purpose. The evidence negates the existence of any evil, purposeful plotting by the defendant and Webster concedes that the reason for combining was honorable and laudable. However, it is clearly apparent that the intent to combine was present in each case and that the two associations, by their very formation, represent combinations and did enter into contracts.

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[4] *Quality and Equality: New Levels of Federal Responsibility for Higher Education*, Carnegie Commission on Higher Education, December, 1968.

A combination which imposes unreasonable restraints on the trade of others is actionable under the Act. An intent to restrain trade is not an essential element of the proof. The burden is met if it is shown that the consequences flowing from the activity complained of amounted to a restraint of trade. In *United States v. Griffith et al.*, 334 U.S. 100, 92 L. Ed. 1236, 68 S. Ct. 941 (1948), the Court stated:

> It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements.

* * * *

Moreover, a laudatory purpose or intent will not excuse violations of the laws. "Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry...is sufficient to void the penalties of the Sherman Act." *American Medical Association v. United States*, 76 App. D.C. 70, 130 F.2d 233 (1942). Also, it is not necessary that the restraint result in total exclusion from the market. A violation of the antitrust laws exists if the combining results in a special advantage to members of an association over non-members or deprives the non-member of a significant business service. *Associated Press v. United States*, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945); *Silver v. New York Stock Exchange*, 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963).

Certain practices, such as price fixing, are conclusively presumed to be unreasonable and therefore illegal per se because of their harmful effect on competition and lack of any redeeming virtue. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). The combination or contract involved in the instant case is not so devoid of potential benefit or so inherently harmful as to fall into the above category without proof that it actually had the effect of restraining trade. In the absence of a per se violation, proof is essential that the agreement resulted in an unreasonable restraint of trade. Although there is no single test to determine unreasonableness, Mr. Justice Brandeis established the following guidelines in *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 62 L. Ed. 683, 38 S. Ct. 242 (1918):

> But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every

> regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Both Middle States and the Federation have adopted policies which provide that to be eligible for accreditation an institution must be a nonprofit organization with a governing board representing the public interest. Since Webster is a proprietary institution, defendant has refused to even consider its qualifications for accreditation. In view of the fact that Middle States is the only accrediting agency oriented in purpose and scope to Webster's accrediting needs, this refusal assumes additional importance.

Applying the standards discussed by Mr. Justice Brandeis in *Board of Trade of the City of Chicago v. United States, supra*, the exclusionary criterion must be viewed in the light of defendant's objectives. In other words, does the criterion serve to further, or is it reasonably related to, the stated purpose of the association? Middle States' corporate charter sets forth that the purpose of the association, inter alia, is "...to encourage the achievement of higher quality...among the higher institutions, secondary schools and other educational agencies in the Middle States." The objectives are concisely set forth in a document published by the Middle States Higher Commission, "Middle States Membership and Initial Accreditation," as follows:

> The Middle States Association is an independent membership organization. It admits institutions of higher education to membership through a process of evaluation and accreditation which has a double purpose. One is to serve the education world and the public by establishing standards of quality and identifying institutions which achieve them. The other, equally important, is to stimulate and help institutions reach their maximum effectiveness.

In support of the exclusionary criterion, defendant argues that a proprietary institution is interested in profits and that failure to devote total resources to education will result in an inferior program. The profit motive, Middle States contends, threatens the integrity of the proprietary institution by diverting it from the basic responsibilities of an educational institution. Educational excellence is determined not by the method of financing but by the quality of the program. Middle States' position, moreover, ignores the alternative possibility that the profit motive might result in a more efficient use of resources, producing a better product at a lower price. Additionally, an efficiently operated proprietary institution could furnish an excellent educational curriculum whereas a badly managed nonprofit corporation might fail. Defendant's assumption that the profit motive is inconsistent with quality is not supported by the evidence and is unwarranted. There is nothing inherently evil in making a profit and nothing commendable in operating at a loss. Furthermore, defendant's position in this regard is weakened by the fact that the Western Association of Schools and Colleges (one of the six regionals) lists three proprietary institutions of higher education in its membership and Middle States itself accredits three proprietary secondary schools.

Webster complains that the lack of regional accreditation stigmatizes the school as being of inferior quality and thereby discourages prospective applicants. It contends that the defendant has acquired monopoly power over the regional accreditation of higher education in the Middle States area. Convincing evidence was adduced that lack of accreditation reflects adversely on the value of credits earned and inhibits the transferability of these credits when Webster graduates seek advanced standing at four-year institutions. Testimony was presented indicating that college admission officers place heavy reliance upon the judgments of regional accrediting associations when considering student applications. Likewise, certain college directories and guides do not list Webster because of its non-accredited status, and high school counsellors are hesitant to recommend an unaccredited school because of the difficulties encountered. A survey conducted by Middle States among its membership indicates that 75% of the member institutions impose certain conditions or limitations upon students transferring from non-member schools. The evidence is also undisputed that, with the increased interest in higher education and the mobility of our society, the regional accrediting associations have grown in importance and prestige. Since the public relies heavily on the judgment of these associations, educational institutions of all types should be evaluated.

Some of the benefits which accrue to institutions of higher learning, the public and students as a result of accreditation are described in the September 1968 edition of *Accredited Institutions of Higher Education*, published by the Federation:

> Accreditation also helps facilitate the evaluation of students' credits for admission or transfer to other institutions. An institution's accreditation warrants the consideration of its academic records at face value when these records are accompanied by clear

> statements of the institution's aims for the program taken. The acceptability of a record for transfer or other purposes depends, of course, upon the appropriateness of the program followed and the quality of a student's performance in it. But when an institution lacks accreditation, it is obliged to establish some other basis for confidence in its work, and its students' records should be appraised individually.

In view of the foregoing, it is obvious that membership in Middle States results in a special advantage to members of the association over non-members and deprives the non-member of a significant business service. Accreditation is necessary to engage in effective competition in the field of higher education today. The court finds that the exclusionary criterion does inhibit Webster's ability to compete in the field of higher education and does not further the stated objectives of the associations. Such a discriminatory exclusion without evidence to justify it must be found arbitrary and unreasonable. Since the criterion is arbitrary and unreasonable, Webster is entitled to relief.

Much of the evidence adduced in connection with the first count of the complaint applies also to count two. As previously indicated, identical injury is alleged and the relief requested is the same. Plaintiff contends that although the Constitution of the United States normally limits only action by the government, a private association performing a state function or exercising delegated powers of a governmental nature becomes subject to the restraints of the Constitution, including the due process clause....Plaintiff further insists that when a private organization becomes so powerful that membership in that association is an economic necessity, the power must be exercised in a reasonable manner. *Falcone v. Middlesex County Medical Society*, 34 N.J. 582, 170 A.2d 791, 89 A.L.R.2d 952 (1961); *Group Health Cooperative of Puget Sound v. King County Medical Society*, 39 Wash.2d 586, 237 P.2d 737 (1951); *Higgins v. American Society of Clinical Pathologists*, 51 N.J. 191, 238 A.2d 665 (1968). Defendant, on the other hand, denies that membership is an economic necessity and that its refusal to make an exception to its rules for plaintiff is arbitrary and unreasonable. Middle States further denies that its activities are of a quasi-governmental nature and contends that the internal administration of a private association is beyond the reach of judicial review. *North Dakota v. North Central Association of Colleges and Secondary Schools*, 99 F.2d 697 (7 Cir. 1938); *Parsons College v. North Central Association of Colleges and Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967)....

As a general rule, courts adhere to a policy of noninterference with the internal affairs of private voluntary associations. Membership in such a group is considered a privilege and not a right. However, there is an exception when the association enjoys monopoly power in an area of vital public concern. If the power, because of public reliance upon it, is great enough to make membership a necessity for successful operation, judicial intervention may be justified.

In Falcone a county medical society had excluded a duly licensed and registered physician in the State of New Jersey from membership by applying a policy which required four years attendance at an approved medical school. Since hospitals in the area required that a doctor be a member of the society in order to use their facilities, the refusal to admit him had serious adverse effects on the doctor's economic and professional status. In directing the society to admit him to membership, the court recognized the reluctance of courts to interfere with the internal affairs of membership associations, but noted that judicial scrutiny and relief were granted when necessary in cases of expulsion. Turning to the special problem of exclusion, the Court said:

> We are here concerned with...an organization, membership in which may...be viewed as "an economic necessity;" in dealing with such an organization, the Court must be particularly alert to the need for truly protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity for earning a livelihood while not impairing the proper standards and objectives of the organization.

See also: *Hurwitz v. Directors Guild of America*, 364 F.2d 67 (2 Cir. 1966).

Evidence has been presented that accreditation by Middle States is necessary for plaintiff to continue operating successfully as a junior college. Prominent educators appearing as witnesses in this proceeding expressed divergent views. However, some who are members of the defendant association testified that regional accreditation is more important today than ever before and that lack of it would be harmful to any institution. Accreditation has become the symbol of academic acceptability, and many states measure the educational excellence of their public institutions by the standards of the regional associations. Furthermore, defendant acts in a quasi-governmental capacity by virtue of its role in the distribution of Federal funds under the "aid to education statutes." Selection of the recipient schools is frequently dependent upon the accredited status of the applicant. Middle States and the other regionals are officially recognized by the United States Commissioner of Education who publishes a list of nationally recognized accrediting agencies and associations which he determines to be reliable authority as to the quality of training offered by an educational institution. 38 U.S.C. § 1653(a).

In addition, the evidence discloses an arrangement between the United States Office of Education and the regional associations relative to the eligibility of institutions which are candidates for but have yet to achieve final accreditation. In 1967 Middle States' practice of attesting to the quality of these institutions through "letters of reasonable assurance" of accreditation was discontinued when the Office of Education agreed to accept in lieu thereof "Correspondent Status" listing as evidence of eligibility for assistance. Mr. John Proffitt, Director of the Accreditation and Institutional Eligibility Staff of the Office of Education testified: "Accreditation has become, fundamentally speaking, a service aspect to the Federal Government in determining eligibility for funding. This has arisen as a result of the language written into Federal funding assistance legislation by Congress."

Over the years Middle States has achieved a position of great influence in American education. It has elevated the quality of education and has become a powerful instrumentality which sets policies in an area of vital concern to the public. Accreditation has been established in the public mind as a mark of distinction and quality. It confers a significant competitive advantage on defendant's members as distinguished from non-members. In view of the great reliance placed on accreditation by the public and the government, these associations must assume responsibility not only to their membership but also to society. There is need for the application of sound standards in the evaluation of all schools and for increased coordination and understanding throughout the educational world. The regional accrediting associations and the Federation have an opportunity to provide new leadership in orienting their policies toward the broader welfare of society and the public interest.

A crisis exists in higher education today. There is tension, turmoil and unrest on the American campus. Students dissatisfied with established routines and unquestioned goals, are demanding reform. In addition, institutions of higher education are experiencing severe economic pressures, and new methods must be found to meet the challenge. It has become increasingly apparent that the demands of the educational deficit cannot be met exclusively by foundation, state and federal financing. In this connection an excerpt from an editorial written by the President of the University of Oklahoma, Dr. J. Herbert Hollomon, when he was Assistant Secretary of Commerce for Science and Technology, warrants quotation:

> Every year I visit 25 to 50 business firms and 25 to 50 colleges and the contrast in being "business-like" is striking. We would not let a company gain a monopoly and become so entrenched that its services declined. Why should this happen in our educational system? We need the competition of business in education which is now in the domain of city, county, and state government. Getting business more heavily

into the educational field is the best way to guarantee competitiveness and innovation and insure against monopolistic control and exploitation.[5]

With a rapidly expanding population, broad social changes, and the complexities of modern life, higher education in the United States is a matter of national concern. A sound educational system is essential to our pluralistic society. This can best be attained by private nonprofit, proprietary, and public institutions working together toward a common goal -- the improvement of higher education.

Webster seeks merely to be given a chance to qualify, but Middle States refuses even to consider its application for academic recognition. This action is arbitrary, discriminatory and unreasonable. The American system of free enterprise is structured on fair and open competition - not monopoly. The national interest is not best served by stifling competition from any available source. With the unprecedented demands upon educational resources in this country, every institution should be given the opportunity to demonstrate its worth. Defendant should accord to non-members an equal opportunity for evaluation at a reasonable cost and on conditions no more onerous than those for members. While precedent in this field is limited, fundamental fairness dictates that plaintiff is also entitled to prevail on count two.

* * * *

The Court concludes that defendant, acting in combination with its membership and with the Federation, has unreasonably restrained plaintiff's trade in the District of Columbia in violation of Section 3 of the Sherman Act. Lack of regional accreditation harms and inhibits plaintiff in its attempt to compete with institutions which are members of the defendant association and the other regional associations. The Court further finds that defendant's requirement that institutions of higher education be nonprofit organizations with a governing board representing the public interest to be eligible for evaluation and accreditation is unrelated to the legitimate and announced purposes of Middle States and the Federation. This standard for exclusion is arbitrary, unreasonable and contrary to the public interest. Unless enjoined by this Court, defendant's conduct in refusing to consider plaintiff's application for accreditation will cause plaintiff to suffer irreparable injury.

Accordingly, plaintiff is entitled to relief on both counts. An injunction will be issued enjoining defendant from denying plaintiff eligibility for accreditation because of its proprietary character and ordering defendant to accept and evaluate plaintiff's application and to accredit plaintiff if it shall otherwise qualify under defendant's evaluation criteria.

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[5] *Journal of Business Education*, May 1967.

Counsel will submit an order in accordance with this opinion.

Findings of Fact and Conclusions of Law are annexed hereto.

Notes and Questions

1. This decision was reversed on appeal in *Marjorie Webster Junior College v. Middle States Association*, 432 F.2d 650 (D.C. Cir. 1970). See *LHE*, § 8.3.2., pp. 876, 879, 881, 883-84. As between the district court and the appellate court, who was "right" -- regarding the antitrust issues? The "governmental action" or constitutional issues? The common law issues? See *LHE* §§ 8.3.2.2., 8.3.2.3., and 8.3.2.4.; and see generally Kaplin, "The *Marjorie Webster* Decisions on Accreditation," 52 *Educ. Record* 219 (1971).

2. What are the major policy issues underlying this case? How does the district court address these issues, and does it do so consistent with its role and competence as a court? Does it come to the "right" conclusions regarding these issues?

3. How does accreditation differ from licensure? How do the two functions interrelate? Compare *LHE* §§ 8.3.1. with *LHE* § 6.3.

4. For a general discussion of antitrust law as applied to higher education, see *LHE* § 7.2.13. For a discussion of state action, common law, and antitrust laws as applied to another type of higher education association (the athletic association), see *LHE* §§ 8.4.1., 8.4.3., and 8.4.4.

5. The relationship between the accrediting agencies and the U.S. Department of Education has evolved since the time of the *Marjorie Webster* decisions. See *LHE* § 8.3.3. The most important development is the passage and implementation of the accreditation provisions in the Higher Education Amendments of 1992. See *LHE*, § 8.3.3., pp. 889-890. Might these new provisions give added strength to government action (state action) arguments like the plaintiff made in *Marjorie Webster*? Might the appellate court have been more receptive to this argument had the 1992 provisions been in effect at the time? See *LHE*, § 8.3.2.3., p. 883.

California State University v. NCAA
Court of Appeals of California, First Appellate District,
Division Two
47 Cal. App. 3d 533; 121 Cal. Rptr. 85
1975

OPINION BY: BRAY

Defendant National Collegiate Athletic Association appeals from the order of the Alameda County Superior Court granting a preliminary injunction.

* * * *

California State University at Hayward and Ellis McCune, in his official capacity as President of CSUH, filed a complaint in the Alameda County Superior Court against the NCAA.[1] The complaint sought injunctive relief enjoining the NCAA from enforcing its decision[2] that the entire intercollegiate athletic program at CSUH was indefinitely ineligible for post-season play.

The court issued a temporary restraining order against enforcement of the NCAA decision, and an order to show cause why a preliminary injunction should not be issued. Prior to the hearing on the order to show cause the NCAA filed a demurrer to the complaint. Following the hearing and an examination of the complaint, affidavits in support of and opposing the preliminary injunction, and the memoranda of points and authorities, the court granted a preliminary injunction enjoining the NCAA from enforcing its order declaring CSUH indefinitely ineligible from participating in NCAA championship athletic events, pending trial of the matter.

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[1] The complaint was subsequently amended to include the trustees of the state colleges and universities and Glenn S. Dumke, chancellor, as plaintiffs.

[2] Under the decision, CSUH was ineligible indefinitely to enter teams or athletes in national collegiate championship competition, and in all other post-season meets and tournaments, and was not eligible to participate in any national television series or programs administered or controlled by the NCAA.

FACTS

CSUH is a campus of the California State Colleges and University System. The NCAA is an unincorporated association organized to supervise and coordinate intercollegiate athletic programs and events among public and private colleges and universities. It is the largest voluntary association of intercollegiate athletics in the country.

An "active" member of the NCAA is a four-year college or university. CSUH became an active member in 1962. An "allied" member is an athletic conference or association composed of active members. The Far Western Conference (hereinafter FWC) is an unincorporated California association organized to sponsor and coordinate intercollegiate athletics on a regional basis. The FWC is an allied member of the NCAA. CSUH is also a member of the FWC.

Upon becoming an active member of the NCAA, CSUH agreed to comply with all the requirements of the NCAA constitution and bylaws. Upon becoming an allied member the FWC agreed to abide by and enforce the NCAA constitution and bylaws. And, under article 3, section 2, of the NCAA constitution, the FWC was charged with the responsibility and control of intercollegiate athletics in the conference.

In 1966 the NCAA adopted bylaw 4-6(b)(1), also known as the "1.6 rule" as follows: "(b) A member institution shall not be eligible to enter a team or individual competitors in an NCAA-sponsored meet, unless the institution in the conduct of all its intercollegiate athletic programs: [para.] (1) limits its scholarship or grant-in-aid awards (for which the recipient's athletic ability is considered in any degree), and eligibility for participation in athletics or in organized athletic practice sessions during the first year in residence to student-athletes who have a predicted minimum grade point average of at least 1.600 (based on a maximum of 4.000) as determined by the Association's national prediction tables or Association-approved conference or institutional tables, ..." The rule caused confusion among NCAA members, and between 1966 and 1973 the NCAA issued several official interpretations in order to clarify the rule. In 1973 the rule was abolished but it was in effect during the period under consideration here. The FWC was responsible for interpreting the NCAA constitution and bylaws for conference members. It interpreted the 1.6 rule as follows in its constitution, article VI, section 3(e): "...Entering freshman students who upon graduation from high school predict less than 1.600 grade point average at a member institution according to NCAA procedures, shall not be eligible to compete in intercollegiate athletics until after they have earned at least a 2.0 (C) average for at least 10 units for any term."

On or about October 30, 1969, Arthur J. Bergstrom, acting in his official capacity as assistant executive director of the NCAA, sent a letter to the FWC explaining the difference between in-season conference and post-season championship eligibility requirements. This distinction would permit a conference to apply its own eligibility rules for in-season conference activity as long as athletes who were not in strict compliance with NCAA eligibility requirements were not eligible for post-conference championship competition. CSUH knew of this letter and relied on the interpretation of the NCAA requirements stated therein as approval of the FWC eligibility requirements set forth in article VI, section 3(e), of the FWC constitution.

In the fall of 1969 one Ronald McFadden was admitted to CSUH under a special admittance program, the Equal Opportunity Program. In the fall of 1970 one Melvin Yearby was admitted under the same program. At the time of admission neither predicted a 1.6 grade point average according to NCAA procedures, and neither participated in intercollegiate athletics his first term at CSUH. At the end of their respective first terms, each had earned better than a 2.0 grade point average for more than 10 units of college work. Each was thereafter permitted to participate in intercollegiate athletics but was not considered by CSUH to be eligible for post-season competition in the freshman year. Article VI, section 3(e) of the FWC constitution was in effect at the time of the admission of McFadden and Yearby to CSUH.

On or about November 27, 1972, the NCAA informed CSUH that McFadden and Yearby had been ineligible to compete in their freshman years because they had failed to comply with the 1.6 rule. The NCAA ordered CSUH to declare the two ineligible to participate in any intercollegiate athletics for a one-year period, 1972-1973. At that time McFadden was a senior and Yearby was a junior. CSUH did not declare the two ineligible and appealed the decision to the NCAA. The NCAA declared the entire intercollegiate program at CSUH to be indefinitely ineligible for post-season play. The CSUH appeal to the NCAA to reverse its decision was refused.

1) Jurisdiction.

Defendant NCAA contends that the trial court erred in failing to follow the doctrine of judicial abstention from interference in the affairs of a private voluntary association. However, courts will intervene in the internal affairs of associations where the action by the association is in violation of its own bylaws or constitution. "It is true that courts will not interfere with the disciplining or expelling of members of such associations where the action is taken in good faith and in accordance with its adopted laws and rules. But *if the decision of the tribunal is contrary to its laws or rules, or it is not authorized by the by-laws of the association, a court may review the ruling of the board and direct the reinstatement of the member....*" [Emphasis added.] (*Smetherham v. Laundry Workers' Union* (1941) 44 Cal.App.2d 131, 135-136 [111 P.2d 948].)

And in *Smith v. Kern County Medical Assn.* (1942), 19 Cal.2d 263[120 P.2d 874], concerning expulsion from an association, a situation which is analogous to suspension, the court stated: "In any proper case involving the expulsion of a member from a voluntary unincorporated association, *the only function which the courts may perform is to determine whether the association has acted within its powers in good faith, in accordance with its laws and the law of the land....*" (Emphasis added.) (*Smith v. Kern County Medical Assn., supra*, at p. 265.)

* * * *

In the instant case plaintiffs' complaint alleges that the NCAA decision, that the entire intercollegiate program at CSUH is indefinitely ineligible for post-season competition, is contrary to the NCAA constitution and bylaws, and that the decision is void as against public policy because it would force CSUH to violate constitutional rights of its students guaranteed by the Fourteenth Amendment. The trial court has not yet finally adjudicated these claims but plaintiffs are entitled to have the matter determined.

Defendant NCAA asserts that as a matter of law no interest of any member of the NCAA is sufficiently substantial to justify judicial intervention because the interest affected by the sanction in question is the school's potential participation in NCAA championship events, an interest which is a mere expectancy as it is contingent upon performance during the season. The NCAA claims that California courts have only intervened when a vital interest was affected, such as where a member was expelled from a union, where a professional or trade organization's actions threatened disastrous economic consequences to a member, where substantial property interests were threatened by expulsion from an association, or where someone was totally excluded from becoming a member of a group.

As to the latter point, the court took a position contrary to appellant's in *Bernstein v. Alameda etc. Med. Assn., supra*, 139 Cal.App.2d 241 at page 253, when it found that the California Supreme Court had implied: "...that in relation to this subject there is no fundamental distinction between a medical association, a labor union and a fraternal or beneficial association. In each type of organization the relationship between the members and the group is determined by contract, the terms of which find expression in the constitution and by-laws." Likewise there can be no fundamental distinction between an athletic association and the above associations where, as here, the claim is that the association failed to abide by its own rules or the laws of the land.

As to the claim that CSUH's interest is not sufficiently substantial to justify judicial intervention due to a mere expectancy of participation in championship events, it has already been discussed that a violation by an association of its own bylaws and constitution or of the laws of the land justifies judicial intervention. Further, that CSUH had, and has, more than a mere expectancy that some of its athletes would earn the opportunity to participate in NCAA championship events but for the suspension is evidenced by the fact that at the time of both the hearing on the temporary restraining order and the hearing on the preliminary injunction, there were upcoming NCAA championship events in which CSUH students, without the imposed suspension, were eligible to compete. Additionally, the decision of the NCAA necessarily affects more than just the possibility of being precluded from championship events. The sanction of indefinite probation affects the reputation of CSUH and its entire athletic program, and thereby also affects CSUH's ability to recruit athletes. Judicial notice may be taken that state schools such as CSUH are deeply involved in fielding and promoting athletic teams with concurrent expenditures of time, energy and resources. The school provides and pays for the coaches, supplies and equipment. It finances, equips, trains and fields the teams. And, its funds pay the NCAA membership dues....The contention that CSUH has no substantial interest to justify judicial intervention lacks merit.

In a case concerning students suspended from the University of Minnesota basketball team by that school, the court commented on whether those students had a substantial interest:

> Likewise, the Big Ten has not disputed that the plaintiffs' interest -- an opportunity to participate in intercollegiate athletic competition at one of its member institutions -- is substantial. Indeed, it would be hard to so dispute in light of analogous cases which indicate the direction in which this area of the law is evolving. *Kelley v. Metropolitan County Board of Education of Nashville*, 293 F. Supp. 485 (M.D.Tenn. 1968)....While 'big time' college athletics may not be a 'total part of the educational process,' as are athletics in high school, *Kelley, supra*, nonetheless the opportunity to participate in intercollegiate athletics is of substantial economic value to many students. In these days when juniors in college are able to suspend their formal educational training in exchange for multi-million dollar contracts to turn professional, this Court takes judicial notice of the fact that, to many, the chance to display their athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the chance to get a college education....

(*Behagen v. Intercollegiate Conference of Faculty Rep.* (D. Minn. 1972) 346 F.Supp. 602, 604.) While that case differs from the instant case in that it concerned students directly, and their suspension from all competition, the language offers guidance here.

The NCAA also claims that plaintiffs do not contend that the procedural process followed by the NCAA in imposing sanctions on CSUH was not full and fair, and asserts: "While insisting that voluntary non-profit associations follow their own procedures in disciplining their members, courts have refused to disturb the association's decision when there was no procedural unfairness and the proceedings conformed to the requirements established by the group."

As already discussed the courts will intervene where the action by the association is in violation of its own bylaws and constitution. That this rule applies to substantive as well as procedural questions is supported by cases which appellant itself cites. In *Smetherham v. Laundry Workers' Union, supra*, 44 Cal.App.2d 131, the court reviewed a bylaw which the petitioner had allegedly violated and found that there was no basis in that bylaw for petitioner's expulsion from the union. In *Smith v. Kern County Medical Assn., supra*, 19 Cal.2d 263, the court reviewed whether the association had followed the procedure provided by the rules of the society in expelling the plaintiff, but also reviewed whether there had been sufficient showing to support a finding that the charge against plaintiff was one which constituted a violation of the rules of the society.

NCAA also asserts that judicial intervention in this type of case is undesirable and raises a number of policy arguments to that effect. Because it is clear that courts will intervene if an association violates its own rules or the laws of the land, these arguments have no weight.

Plaintiffs have raised sufficient questions as to whether the NCAA has violated its own rules or the laws of the land by its action to justify intervention by the trial court to determine these questions.

2) The trial court did not abuse its discretion in issuing the preliminary injunction.

The NCAA contends that the trial court abused its discretion in issuing the preliminary injunction because plaintiffs failed to show irreparable injury and there is no likelihood that plaintiffs will succeed in any of their claims.

* * * *

The NCAA has failed to show an abuse of discretion in this instance.

Both the NCAA and CSUH also raise in great detail arguments as to the merits of their respective positions in the question of whether a permanent injunction should issue. These questions will be determined by the trial court and are not suitably addressed to this court on this appeal from the granting of a preliminary injunction.

* * * *

Judgment affirmed.

Notes and Questions

1. Under the principles in this opinion, is there any basis for challenging an athletic association's decision that technically is in accordance with its own constitution and bylaws? Note the references in the opinion to actions that are "taken in good faith" and actions that are "against public policy." Do these references suggest any arguments beyond the argument that an association action inconsistent with its own rules is invalid? See *LHE*, § 8.3.2.2.

2. Who can sue an athletic association under the principles of this case? Could a student-athlete sue? A coach?

3. In addition to challenging an athletic association's actions under the principles in this opinion, what other types of challenges might be permissible using other legal principles? See LHE, §§ 8.4.1., 8.4.2., and 8.4.3.

4. According to the court in the *California State University* case, the NCAA raised "a number of policy arguments" to the effect that "judicial intervention" into its affairs is "undesirable." What are the policy arguments that might be made to support this position? Do you agree with the court that "these [policy] arguments have no weight" in situations where the athletic association has violated its own rules?

5. Subsequent to the appellate court's affirmation of the preliminary injunction in the *California State University* case, the case went to trial, at the conclusion of which the trial judge issued a permanent injunction. In *Trustees of State College and Universities v. NCAA*, 147 Cal. Rptr. 187 (1978), the appellate court again affirmed the trial court. See *LHE*, § 8.4.4., p. 902.

I.

CHAPTER IX: THE COLLEGE AND THE BUSINESS/INDUSTRIAL COMMUNITY

SEC. 9.3. The College as Seller/Competitor

Jansen v. Atiyeh
Court of Appeals of Oregon
87 Ore. App. 617; 743 P.2d 765
1987

OPINION BY: JUDGE DEITS

Plaintiffs, Ashland area motel and hotel operators, taxi drivers and caterers, sought declaratory and injunctive relief against defendant Oregon State Board of Higher Education (Board) acting by and through Southern Oregon State College (SOSC). Plaintiffs' complaint alleged that defendant exceeded its authority in providing housing, food and transportation to groups[2] attending the Shakespearean Festival whose members are not fully matriculated students of SOSC. The Board contends that none of the disputed activities exceed its authority.

* * * *

The Board challenges the court's ruling concerning the services for non-SOSC students and out-of-state students at SOSC. See n 9, *infra*. Plaintiffs cross-appeal, challenging the court's rulings concerning the Board's authority to furnish services to non-State Board of Higher Education students attending educational institutions located within Oregon.

* * * *

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[2] The groups consist of participants in the Elderhostel and Senior Venture programs, as well as other non-SOSC students. Elderhostel, Inc., is a Massachusetts non-profit corporation that contracts with colleges nationwide to house persons over 60 years of age on campuses for a week or more. The Senior Ventures program was originated by SOSC and provides the same basic program as Elderhostel, except that the age requirement is 55 years or older and the length of the program is one and one half weeks. The programs include lodging, food and non-credit lectures. Extracurricular activities such as field trips may be offered.

SOSC is located in Ashland, which hosts the annual Oregon Shakespearean Festival, a series of theatrical performances and related events extending from early spring until late fall. The festival is a nonprofit corporation unaffiliated with SOSC or the Board. In the early 1980's, SOSC administrators began implementing a plan to increase revenues by making their dormitory facilities available to groups of people meeting certain qualifications. In order to qualify to use SOSC facilities, a group must include more than 15 persons and must have an educational objective. In order to meet the educational requirement the group must be:

> "A gathering of a group of individuals with the purpose of learning new skills, sharing insights or exploring specific problems relating to a defined subject, issue, discipline, or profession * * *." SOSC's Conference and Special Events Guidelines.

SOSC does not necessarily offer the groups either on- or off-campus organized instruction. The educational objective of the groups typically consists of exposure to or discussion of the plays presented by the Shakespearean Festival.

When SOSC decided to offer its facilities for use by the groups, it became necessary to renovate some of the resident halls. Most of the costs of renovation were raised through issuance of Article XI-F(1) bonds. Plaintiffs argue that the use of facilities constructed or renovated with the bonds is inconsistent with the provisions of Article XI-F(1) of the Oregon Constitution and the requirements of ORS 351.160(1).

Article XI-F(1) authorizes the issuance of revenue bonds "to finance the cost of buildings and other projects for higher education, and to construct, improve, repair, equip, and furnish buildings and other structures for such purpose, and to purchase or improve sites therefor."[5] ORS 351.160(1),

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[5] Article XI-F(1) provides:

> "Section 1. The credit of the state may be loaned and indebtedness incurred in an amount which shall not exceed at any one time three-fourths of one percent of the true cash value of all the taxable property in the state, as determined by law to provide funds with which to redeem and refund outstanding revenue bonds issued *to finance the cost of buildings and other projects for higher education, and to construct, improve, repair, equip, and furnish buildings and other structures for such purpose*, and to purchase or improve sites therefor.
>
> "Section 2. The buildings and structures hereafter constructed for higher education pursuant to this amendment shall be such only as conservatively shall appear to the

which was enacted to carry out the provisions of Article XI-F(1), provides:

> "The board of higher education may undertake the construction of any building or structure for higher education when, in the judgment of the board, it appears that the building or structure will be wholly self-liquidating and self-supporting from revenues to accrue from the operation thereof and from gifts, grants or building fees, and from unobligated revenues of buildings or projects of like character. The board may enter into contracts for the erection, improvement, repair, equipping and furnishing of buildings and structures for dormitories, housing, boarding, offstreet motor vehicle parking facilities and other *purposes for higher education* pursuant to Article XI-F(1) of the Oregon Constitution, ORS 351.160 to 351.190, 351.350 to 351.460, 351.480 and 351.490." (Emphasis supplied.)

Plaintiffs argue that SOSC's use of its facilities for non-SOSC students does not satisfy the requirement that the facilities be used for purposes of "higher education."

Plaintiffs are correct that buildings constructed or improved with proceeds of Article XI-F(1) bonds must be used for purposes of "higher education."[6] Thus, the crucial issue in this case is whether SOSC's policy of allowing the groups to use the facilities is within the definition of "higher education."

The terms are not defined in the statutes, nor are they exact terms, see *Springfield Education Assn. v. School Dist.*, 290 Or 217, 223, 621 P2d 547 (1980), because they do not communicate a precise meaning. Whether the term is interpretive or delegative depends upon whether it embodies "complete expressions of legislative meaning," 290 Or at 224, or expresses "noncompleted legislation that the agency is given delegated authority to complete." 290 Or at 228. In view of the broad

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> constructing authority to be wholly self-liquidating and self-supporting from revenues, gifts, grants, or building fees. All unpledged net revenues of buildings and other projects may be pooled with the net revenues of new buildings or projects in order to render the new buildings or projects self-liquidating and self-supporting.
>
> * * * *
>
> (Emphasis supplied.)

[6] We do not address the question of whether, because the funds would be available to the Board to be used for educational purposes, allowing groups or individuals who do not have an educational purpose to use SOSC facilities for a fee would meet the requirement that the facilities be used "for higher education."

general authority that the legislature has given to the Board to manage the higher education system of the state, we conclude that the term is delegative and that the Board has the authority to define the terms "higher education." The legislature has granted the Board the authority to "[s]upervise the general course of instruction * * * and the research, extension, educational and other activities" of each institution under its control. ORS 351.070(2)(a). It may "[m]aintain cultural and physical development services" of its institutions. ORS 351.070(2)(c). It may appoint and employ presidents, teachers and employees of its entities, ORS 351.070(1)(a), set fees for enrollment, ORS 351.070(1)(c), confer degrees, ORS 351.070(1)(f), and prescribe qualifications for admission into its institutions. ORS 351.070(1)(g). In addition, the Board may adopt regulations and policies relating to certain matters without complying with the rulemaking provisions of the Administrative Procedure Act. ORS 351.072(1)(a).

The Board also has been delegated broad authority over the management of property. ORS 351.060 provides:

> "The State Board of Higher Education may:
>
> "(1) Control and provide for * * * the custody and occupation of the * * * buildings * * * belonging to each and all the institutions, departments or activities under the control of the [board].
>
> "(2) Manage, control and apply all property of whatever nature given to or appropriated for the use, support or benefit of any or all of the institutions, departments or activities under the control of the [board].
>
> "(3) Erect, improve, repair, maintain, equip and furnish buildings, structures and lands or higher education.
>
> "(4) [C]ontrol, * * * manage, operate, lease, lend, invest, improve and develop any and all property, real or personal:
>
> "* * * *
>
>> "(b) * * * for the benefit of any of the institutions, departments or activities under the control of the board * * *."

We conclude that the legislature has delegated to the Board the authority to interpret the term "higher education."[8] We also conclude that the Board's interpretation in this instance was within its discretion and is not inconsistent with the constitutional or statutory provisions. As noted above, the statutory scheme relating to higher education contemplates that the system may offer more than traditional formal degree programs. The Board may maintain "cultural development services," ORS 351.070(2)(c), as well as offer "extension" activities, ORS 351.070(2)(a), in its instructions. SOSC has decided that only groups having an educational mission may use its facilities. That use is within those contemplated by the legislative scheme.[9]

Plaintiff's remaining argument is that SOSC's policy is required to be, and was not, adopted through formal rulemaking procedures and, thus, is void. The Board contends that SOSC's policy is exempt from APA rulemaking procedures. ORS 351.072(1). We agree.

* * * *

On appeal, affirmed as to award of costs, disbursements and attorney fees, and reversed as to determination that Board exceeded its authority in providing services to non-students and to students of institutions located outside Oregon; on cross-appeal, affirmed.

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[8] The Board's subdelegation to SOSC is lawful. ORS 183.325; ORS 351.072.

[9] The parties agree that there was no reason for the court's distinction between non-Board students who attend educational institutions within Oregon and non-students and out-of-state students to whom the Board does not provide organized higher or continuing education instruction. We agree and affirm on plaintiff's cross-appeal pertaining to the Board's housing of non- and out-of-state students.

* * * *

Notes and Questions

1. This is a case concerning the institution's and state board's scope of authority under state law. See generally *LHE* § 6.2. In such cases it is important to trace the line of authority from its original source (here, the state constitution) to the actor that ultimately exercises the authority (here, the state college or a particular state college official). What, precisely, is the line or chain of authority in this case? How does the authority get from the Board to the college (SOSC)? Does the court construe this authority broadly or narrowly, and why?

2. The court focuses primarily on the use of the state bonds to finance renovation of the dormitories where the non-student groups would stay. Suppose the focus had been on the food and transportation services rather than the housing. Suppose, for example, the facts showed that the college: (a) provided three meals a day (including a box lunch) to the members of the non-student groups in a dining facility that was not part of the renovated dorms; (b) provided daily bus transportation to and from the Shakespearean Festival for the members of the non-student groups; and (c) charged a per-member fee for these services that enabled the college to make a substantial profit. Would these entrepreneurial activities (see *LHE* § 9.3.1.) be within the scope of the college's authority? See *LHE* § 9.3.2.1.

3. Suppose the college determines that over 75% of its dormitory rooms are unused in the summer; that there are numerous travelers and tourists who are temporarily in the area for a variety of purposes during the summer months; that there would likely be a demand for inexpensive transient housing during the summer; that the college could use its unused dormitory space to fill this demand; and that the college could set its room rate high enough to allow for a substantial profit. Would such a use of the dormitories be within the college's scope of authority? Would it make any difference that the college had run a budget deficit in the past year and projected another deficit for the following year? That the dormitories to be used had not been built with Article XI-F(1) bonds?

4. For discussion of the issue about rulemaking procedures raised at the end of the court's opinion, see *LHE* § 6.5.3.

PART III

LARGE-SCALE PROBLEM-SOLVING EXERCISES

Introductory Note

This section of the *Instructional Supplement* contains includes large-scale problems, each covering interrelated sets of issues and each probing professional roles and problem-solving skills as well as substantive law. As the *Preface* suggests, there are various ways in which the instructor or workshop leader may choose to use these problems. Immediately below are a set of "problem-solving directions" and a set of "problem review questions." One or the other of these (or perhaps both) should be suitable for most uses that instructors may make of these problems. (These directions and questions do not fit particularly well with Problem F, however, so separate directions and questions are contained in the problem itself.) These directions and questions make the problems adaptable to groups composed exclusively of education students or educators and groups composed exclusively of law students or lawyers, as well as to mixed groups. These directions and questions should also be transferable to other problems that instructors or participants may devise themselves.

Part I of this Supplement contains useful background and suggestions for approaching large-scale problems such as those below.

Problem-Solving Directions

It will usually be helpful for students or workshop participants to work through these problems in role. Education students or educators can fill policy-maker and other non-legal roles; law students or lawyers can fill legal roles. For instance, if a provost or other college official is involved in the problem, education students or educators may work through the problem in that role. Law students or lawyers may work through the problem as if they were counsel to the college involved. or as if they were counsel to the person(s) who may have legal claims to assert against the college.

For each problem, assume that the institution has regular legal counsel whom administrators may consult directly. Counsel does not routinely review every action of the institution, however, nor are administrators expected to routinely consult counsel before making any decision. Since legal counsel's time is a limited resource, the practice is to consult counsel only in selected instances as the administrator's judgment dictates.

For education students or educators playing administrator roles, these questions should fit all problems in this Part:

A. What concerns would you have about the law's potential effect on your ability to deal effectively with the problem presented to you?

B. Would you consult legal counsel? Why or why not?

C. What further steps, if any, would you need to take before consulting counsel or deciding whether or not to do so?

D. If you would consult counsel, what specific questions would you ask and what specific advice or service would you request?

For law students or lawyers filling roles of legal counsel for the institution, these questions should fit all problems in this Part:

A. Would you advise the administrator(s) that there are substantial legal aspects to the problem, and that you therefore should be involved in the solution of the problem?

B. What specific questions would you ask the administrator, and what further information would you need?

C. What would you advise the administrator regarding how the law constrains his/her decisionmaking on this matter? In light of these legal constraints, what steps would you recommend that the administrator take?

D. What preventive law measures would you suggest to prevent this type of problem from arising again or to make its resolution easier if this type of problem does arise again?

For law students or lawyers representing the person(s) who has been or will be adversely affected by the institution's action, these questions should fit all problems in this Part:

A. Would you advise your client(s) that he/she has a viable legal claim to assert against the institution?

B. What further information would you need in order to evaluate this claim fully?

C. How would you proceed to raise and press your client's claim? What forum(s) for dispute resolution would you suggest to your client?

Problem Review Questions

Whether or not one uses role-playing as suggested above, these questions should provide a useful guide for the class or workshop's review, or individual participants' independent review, of the problems in this Part.

1. What are the legal issues presented by this problem? In what order should these issues be addressed? Which issues are most critical to the resolution of the problem, and why?

2. What are the policy issues (i.e., issues of educational policy, administrative policy, or public policy) presented by this problem? In what ways are these policy issues interrelated with the legal issues?

3. What are the professional responsibility or ethical issues presented by this problem -- for legal counsel? for administrators and educators?

4. Will full resolution of this problem require that the institution involved proceed in a treatment law mode? A preventive law mode? Both? (See *LHE* § 1.7.2.) What are the forums for dispute resolution to which the parties in this problem may resort? (See *LHE*, § 1.1., pp. 2-3, § 1.4.1., and § 1.4.6.) What should be the forum of first resort? What would be the preferred forum for each of the parties?

5. How might the legal, policy, or professional responsibility issues in this problem have differed had the institution involved been public [or private] rather than private [or public]? (See generally *LHE* § 1.5.) If a private institution, how might these issues have differed had the institution involved been religiously affiliated [or secular] rather than secular [or religiously affiliated]? (See generally *LHE* § 1.6.) Would the forums for dispute resolution have differed depending on whether the institution involved is public, private secular, or private religious?

6. How might the issues, or the forums for dispute resolution, have differed in this problem had it involved a secondary school rather than an institution of higher education?

PROBLEM-SOLVING EXERCISE A

(The Student Teacher With HIV Problem)

Martin Chalk, dean of the State University School of Education, has just been advised that a senior, Joe Doe, has been diagnosed as HIV-positive. As a senior, Doe is in the middle of a twelve-week student teaching assignment in a local elementary school. Doe plans to be an elementary school teacher. He cannot be certified to teach in the state without completing his student teaching assignment.

The Dean, following university procedures, contacted the chair of the university's Committee on Communicable Diseases, which includes medical school faculty who are experts on infectious disease. The Committee recommended that the student be placed on an indefinite leave of absence. Under no circumstances, said the Committee, should the student continue to teach young children because of the potential risk to children of infection . Elementary school teachers, the Committee said, work very close to children, and children frequently injure themselves and bleed, either in class or on the playground. The Committee was divided about whether the Dean should notify the elementary school that Doe is HIV-positive.

Dean Chalk then notified Joe Doe that, because of his HIV infection, he has been placed on an indefinite leave of absence from his studies . At the same time, the Dean invited Doe to meet with him to consider other educational and/or career alternatives. Doe took strong exception to the Dean's decision and hired an attorney. The attorney notified Dean Chalk that, unless Doe is fully reinstated, he will sue for breach of contract, defamation, emotional distress, and violation of Doe's civil rights under Section 504 of the Rehabilitation Act and similar state disability laws.

Dean Chalk and the University must now decide how to respond to Doe's claims and must also decide what the university's legal responsibilities may be regarding Doe's young students, his fellow students, and his professors.

PROBLEM-SOLVING EXERCISE B[*]

(The Students With Mental Disorders Problem)

State University, a public institution, has a large and diverse student body of 9,000 undergraduates and 4,000 graduate students. To maintain behavioral standards on the campus, State U. has a written disciplinary code called the *Code of Student Conduct*. It also has a Mental Health Policy that applies to students who have, or whom administrators suspect of having, mental health problems that manifest themselves on campus.

The Mental Health Policy states as follows:

> I. The University considers the maintenance of good mental health to be a critical aspect of the educational experience. To assist students in this regard, the University maintains a Counseling Center on campus that is staffed with mental health professionals and available to students 24 hours a day.
>
> II. The Dean of Students may refer a student to the Counseling Center for evaluation whenever the Dean believes that the student is suffering from a mental disorder that is adversely affecting his or her academic performance or behavior on campus.
>
> III. A student will be subject to involuntary administrative withdrawal from the University, or from University housing, if the Provost determines that the student suffers from a mental disorder that is adversely affecting his or her academic performance or behavior on campus in a way that is prejudicial to the institution or other members of its student body.

Not infrequently, administrators of State U. are confronted with situations that may call for application of the Mental Health Policy. Usually such situations arise because another student or a faculty member, or sometimes a parent, has complained about the behavior of a particular student. The Provost is now facing two such cases, the circumstances of which are set out below. The Provost must determine what action to take in each of these cases.

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[*] With thanks to Steven Olswang, Vice-Provost for Academic Affairs at the University of Washington, who drafted the original problem on which this problem is based.

1 . Dennis and the False Prophets*

Dennis, a resident student, frequently sits in the middle of the residence hall in a yoga position and stares at everyone who passes. He also burns incense, chants and calls for strength to rid the world of pagan religions and false prophets, and then goes door to door telling other residents that they are false prophets. There are signs painted on bathroom doors that "[t]he end is near for false prophets." Many residents on the floor are very nervous and fearful. Most have complained to the Resident Advisor.

The Resident Hall Director spoke to Dennis, who simply stared at the Director and proclaimed "I don't talk to those who belong to pagan religions. You are a devil and a false prophet. Your end is near." The Director informed Dennis that others in the hall were nervous, could not study or sleep, and were even afraid to use the bathroom at night. Dennis did not respond, and left the Director's office.

The day after the meeting with the Director, Dennis was observed placing a sign on another student's room door that said "You are a false prophet and you cannot be allowed to continue your false ways. I commit my blood to put an end to your fake prophecies." There was blood smeared on the sign. The same day the Director received a blood stained hunting knife in the mail with a note that said "You are a false prophet."

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2. Gerry and the L.S.D.[*]

Gerry is an eighteen-year-old freshman who lives in a residence hall reserved for honor students....One evening, she and her roommate ordered a pizza. When the pizza arrived, Gerry produced a large kitchen knife and proceeded to cut the pizza into smaller sections. Then, while her roommate was distracted at the other end of the table, Gerry walked behind the roommate and stabbed her, causing a serious wound requiring lengthy hospitalization. There had been no prior history of violence between the two women, who had regarded each other as close friends.

Gerry was promptly arrested and held in the county detention center for two days, until her parents paid the $10,000 bail set by a local magistrate. Her parents also obtained the services of a prominent criminal lawyer. His strategy in the case was to assert that Gerry's behavior was the result of her first time experimentation with L.S.D., shortly after she arrived at the college. The L.S.D. reportedly produced a delayed hallucinatory experience, in which Gerry believed her roommate was planning to harm her by spreading poisonous mushrooms on the pizza. Gerry's lawyer expected to be successful in delaying her criminal trial for several months, and obtained a statement from a psychiatrist, who asserted that Gerry's hallucinatory experiences could be controlled with proper medication. Remarkably, the lawyer also secured the support of the victim, who wrote a forgiving testimonial in Gerry's behalf. Finally, Gerry's lawyer contacted the Dean of Students and stated that Gerry would now be returning to her residence hall room and resuming her studies. He cautioned the Dean that any administrative or disciplinary action taken against his client would be challenged on the ground that Gerry was a "handicapped" person, as defined by Section 504 of the Rehabilitation Act of 1973. Furthermore, it was the lawyer's contention, given the upcoming criminal trial, that any administrative or disciplinary action would constitute a form of double jeopardy, prohibited by the Fifth and Fourteenth Amendments to the United States Constitution.

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PROBLEM-SOLVING EXERCISE C

(The Homelessness Protest Problem)

Increasingly, on campuses across the country, college students have organized or participated in demonstrations demanding that their institutions give greater attention to the plight of the homeless in America. The public university in your state has recently been the scene of such demonstrations. In press statements and otherwise, the protesters claimed that the university is insensitive to the needs of the homeless and has failed to direct any of its human or financial resources to the social problem of homelessness.

On your campus and elsewhere in your state, the protests against homelessness have been organized by a group called Coalition Against Homelessness. This group was organized by students from various campuses in the state, along with community leaders and residents of the communities where the campuses are located. The organization views itself as part of a national campaign to send a message to politicians, higher education officials, and the public that homelessness has no place in our society. Typically, the homelessness protests have centered upon the erection of cardboard huts in the public areas of campuses. The declared purpose for using these cardboard huts is to impress upon school officials and the campus community the squalid living conditions and the desperation of the homeless in America. Sometimes, to enhance the impact of the protests, participants have attempted to live in, and to sleep overnight in, the huts that they have erected.

Last week, coalition members erected nine huts on the main campus quadrangle at the public university. The majority of the participants were students at the university. For two nights after the huts were set up, students slept overnight in them. On the third day, however, the Vice-Chancellor for Student Affairs ordered the huts torn down. Later that day they were dismantled by a university maintenance crew. (The huts had been an object of curiosity on the campus and had twice been vandalized prior to being torn down.) Coalition members vowed to set up other huts and continue the protest. According to one member, "We are here to educate people about homelessness. If that isn't the business of the university, I don't know what is."

The group's leaders scheduled a meeting with the University Chancellor and requested formal permission to erect other huts. The Chancellor denied the request, citing overriding concerns for the safety and security of members of the campus community. The Chancellor called the huts a "safety and security hazard liable to attract vandals." He authorized campus police to arrest anyone seeking to construct another protest hut on the campus or anyone interfering with the university maintenance crew's dismantling of any hut that is erected.

Yesterday afternoon the coalition sponsored another protest. Amid chants of "Down with Homelessness; Up with Huts," protest participants set up three other huts in the center of the campus on the main quadrangle. Several persons immediately occupied each of the newly erected huts, and approximately two hundred other persons gathered around the huts joining hands, chanting, and singing. After the protest had continued for about an hour, campus police arrived on the scene. At the same time several squad cars of local police from the city arrived. Working together, the campus and local police arrested three persons who were occupying the huts, as well as nine other persons who appeared to be the leaders of the protest. Using bullhorns, the police then disbanded the demonstration. Some of the remaining demonstrators marched across campus to the administration building and met with the Chancellor, who reiterated that the huts would not be allowed on campus. All the persons arrested were charged with trespass in violation of state law and with willful disturbance of school activities in violation of state law. Eight of the twelve persons arrested were students enrolled in the university. These students were also referred to the university judicial system and charged with a violation of the campus code of conduct: engaging in an unlawful demonstration on campus. Potential penalties for such a charge, if proven, include suspension or expulsion from the university.

The Chancellor must now decide how to deal with the various aspects of this problem, including whether to respond to a request from the Coalition Against Homelessness that the university negotiate with it concerning the dropping of charges.

The two relevant state statutes are attached to this problem, as is the pertinent portion of the campus conduct code.

State Trespass Statute

Sec. 11-521. *Trespass.* Every entry without lawful authority onto the property of another, when committed with malicious intent, shall be a misdemeanor punishable by imprisonment not exceeding 30 days or by fine not exceeding $500.

State "Willful Disturbance" Statute

Sec. 44-106. *Disturbance of School Activities.* Every willful disturbance of the lawful activities of a public school or university, and every willful interference with the orderly use of school or university facilities, shall be a misdemeanor punishable by imprisonment not exceeding 60 days or by fine not exceeding $1,000.

Code of Campus Conduct

Distribution of leaflets, circulation of petitions, speeches, and demonstrations are permitted on the campus grounds unless they will disrupt the normal operations of the University or infringe on the rights of other persons. Solicitation of commercial sales on the campus grounds is prohibited without the express authorization of the Vice-President for Business Affairs.

PROBLEM-SOLVING EXERCISE D[*]

(The Faculty Skipping Class Problem)

Dr. Goose, President of the State University of Farmland, calls the Vice-President for Academic Administration into his office and relates the following story:

> Yesterday I was at Barnyard Hall when my attention was drawn to a classroom because of the volume of noise coming from within. When I looked inside, I found the students there, but no faculty. I asked the students what class this was and was informed it was Agronomy 301, scheduled to be taught by Drs. Swine and Bovine. The students further told me that these professors came the first day of class, over seven weeks ago, and told them that all they had to do to get an "A" was to come to class everyday and sign the class roster.
>
> I then went to see Dr. Equine, the Chairperson of the Department of Agronomy, who informed me that Drs. Swine and Bovine were off consulting for Stye Incorporated. I asked him if he knew about this practice, and he stated he did. He also told me that he, too, consults for Stye Incorporated and knew that Drs. Swine and Bovine could use the extra money, just like him.

Dr. Goose tells the Vice-President that he wants Dr. Equine removed as Chairperson immediately, and he further wants all three faculty members separated from the University as soon as possible. However, because Stye Incorporated is a major benefactor of the University, he wants to have all this done without any publicity, if at all possible.

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[*] With thanks to Steven Olswang, Vice Provost for Academic Affairs at the University of Washington, who drafted the original problem on which this problem is based.

The Vice-President returns to her office and checks the personnel files, learning that:

1. Dr. Swine is an Assistant Professor in the third year of his first three-year contract.

2. Dr. Bovine is an Assistant Professor in the first year of his second three-year contract.

3. Dr. Equine is a Professor who received tenure 18 years ago. He has been Chairperson of the Department of Agronomy for 7 years and is President of the Faculty Senate.

4. The University has adopted the 1940 *Statement of Academic Freedom and Tenure* of the AAUP, as well as its 1976 *Recommended Institutional Regulations on Academic Freedom and Tenure* [see *LHE*, § 3.7.1., p. 300].

Upon checking further, the Vice-President also learns that not all students in Agronomy 301 are happy with the cozy arrangement instituted by the professors. Some of these students are requesting a refund of tuition for the course or the entire semester, and others may claim the university has an obligation to them to re-build the entire Agronomy Department before next academic year.

PROBLEM-SOLVING EXERCISE E[*]

(The Hate Speech Problem)

State University is a large public institution. In recent years, the cultural diversity of the student body has increased substantially. During the same time, there have been a number of "hate speech" incidents at the university. (Hate speech is speech that demeans or denigrates particular persons or groups on the basis of race, ethnicity, gender, religion, sexual orientation, or disability.) The frequency of such incidents has been increasing. Most of these incidents have involved speech by students directed at other students. Many students have thus become concerned, especially minority students, Jewish students, and gay students. The university's student affairs administrators share these concerns, as do many university officials including the president.

State University has a Code of Conduct that regulates student behavior and subjects violators to various penalties including suspension and expulsion. Some of the hate speech incidents at the university have not seemed to fit within any of the Code's prohibitions, however; and other incidents, though violative of one or more Code provisions, merited only minor penalties that seemed inadequate given the gravity of the harm flowing from the use of hate speech.

The President of State University appointed a University Task Force on Hate Speech to review the campus hate speech problem and recommend an appropriate institutional policy. After considerable study, the Task Force submitted a final report to the President that included a proposed hate speech regulation and a recommendation that it be implemented.

The Task Force Report focused on civility and tolerance. Hate speech and hate behavior was a special concern, especially student hate speech and behavior directed against other students. Although the Task Force acknowledged that any policy encompassing verbal or written communications would raise concerns about free speech rights, it took the position that hard-core slurs and insults, and other acts of harassment or intimidation, are beneath the dignity of the First Amendment and are no part of the "free trade in ideas."

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[*] Information for this problem, and regulatory language for the hypothetical regulation, were adapted primarily from these sources: (1) *Report of the President's Ad Hoc Committee on Racial Harassment*, The University of Texas at Austin, Nov. 27, 1989 (Dean Mark Yudof, Chair); (2) "Civility Standards: Policy Against Discriminatory Harassment," an Oregon State University discussion paper, March 18, 1991 (drafted by Thomas Scheuermann); (3) Kaplin, "'Hate Speech' on the College Campus: Freedom of Speech and Equality at the Crossroads," 27 *Land and Water L. Rev.* 243 (1992) (Winston Howard Lecture, Univ. of Wyoming, April 12, 1991); (4) Smolla, "Introduction: Exercise in the Regulation of Hate Speech," 32 *Wm. & Mary L.Rev.* 207 (1991); and "Memorandum (with attachments) to Francis L. Lawrence, President," from the Free Speech Committee, Rutgers, Oct. 14, 1992. Students working on this problem should not consult any of these sources until after completing the problem, unless the instructor directs otherwise.

The Task Force recommended two changes in existing university policies. First, a new offense of "harassment" and "intimidation" should be created, the penalties for which could be enhanced if the harassment or intimidation was motivated by the race, ethnicity, gender, religion, sexual orientation, or disability of the victim. Second, existing conduct rules should be amended to provide that, if the wrongdoer's actions were motivated by the victim's race, ethnicity, gender, religion, sexual orientation, or disability, such motivation would be an aggravating circumstance which may justify a more severe punishment for the wrongdoer. These two proposed policies would be applicable, on or off the campus, when the alleged victim and the alleged wrongdoer are both members of the university community. The proposed policies would also apply to visitors or others who are not members of the university community if the violation takes place on campus and the alleged victim is a member of the university community.

The president sent the Task Force Report and proposed regulation to the university's General Counsel for review. The General Counsel noted that "potential First Amendment issues would be raised by any regulation of hate speech," but determined that "the Task Force has provided the basis for a regulation that would be defensible." After making a number of drafting changes in the committee's proposed regulation, the General Counsel approved it "conditioned on adoption of these modifications." The president submitted the Task Force report and the revised regulation to the Faculty Senate and to the Deans' Council, both of which approved. The president then directed that the regulation be implemented consistent with standard university procedures. (A copy of the new regulation is attached.)

Shortly after the new regulation went into effect, and before any disciplinary actions had been instituted under it, the state affiliate of the ACLU -- representing a small group of students and faculty members -- filed suit against the university and the president, claiming that the university's new regulation is invalid under the free speech and press clauses of the U.S. Constitution. Attorneys for the ACLU are now at work developing this litigation, and staff attorneys from the university general counsel's office are considering how best to defend the university's interests.

Meanwhile, university administrators have invoked the new regulation in four instances. In the first, an undergraduate student, returning from a late-night drinking party with fraternity brothers, passed by a campus dormitory and shouted racist comments that included prominent use of the word "nigger." From a dorm window, a resident asked the boisterous student to quiet down, whereupon the latter shouted back: "What are you, a faggot?" and "What are you, a Jew?" He repeated these shouts several times as dorm residents opened their windows and looked out. The student was found to have violated the new regulation and was suspended from school for a semester.

In the second incident, several white male students followed an African-American woman student across the campus at night. They taunted her, making sexually suggestive comments that prominently included the word "whore" and the statement "I've never tried a nigger before." The male students were expelled.

In the third incident, students blew up condoms with helium and made a balloon bouquet that they pinned to the dormitory room door of a female student. Along with the condoms was a sign reading "Jewish slut." These students were put on disciplinary probation for a semester.

In the fourth incident, a professor made statements at a meeting of a faculty academic standards committee. He asserted that minority students' academic performance suffers from the "inferior intelligence" of minorities and that this in turn is due to "genetic differences between whites and minorities." When committee members asked what support he had for these statements, he replied, "Isn't it obvious?" The professor's statements were reported in the campus newspaper; the story included the professor's response to a student reporter's request for comment: "The committee discussion was confidential and should not have been relayed to the paper -- but yes, I said those things. I stand behind them. That's just the way it is." The professor was censured by a faculty committee, and a letter of reprimand was placed in his personnel file.

State University Civility Code

Section 1. State University is a place of robust intellectual discourse. A university is also, however, a unique academic community with a unique mission. Fulfillment of its mission may require that community members maintain reasonable levels of rationality and civility in their relations with other members of the community. Each member of the community is expected to be sufficiently tolerant of others that all community members can freely pursue academic and institutional goals in an open environment, can participate in intellectual discourse, and can take full advantage of educational opportunities. As a condition upon entry into this special community, the University requires its faculty, students, and staff to refrain from certain types of speech that harass or intimidate other community members. Actions that restrict the rights and opportunities of others through harassment or intimidation, even if these actions are communicative in character, are not protected and will not be condoned.

In an ideal world, a civility policy would be unnecessary. But in the real world of our campus, our community, and our state -- which are rapidly becoming more diverse in terms of race, culture, and other characteristics -- the University has the educational, moral, and legal imperative to deal with issues of incivility, especially when they involve denigration or humiliation of others because of their race, ethnicity, or other group characteristics.

Section 2. It is the policy of State University to maintain an educational environment free from harassment or intimidation of either students or employees. Harassment and intimidation, as defined in Sections 3 and 4 below, are expressly prohibited. Students, faculty, and non-faculty employees are all subject to disciplinary action for violation of this prohibition. Campus visitors and other persons who are not members of the academic community will be subject to banishment from the campus for violation of the prohibition.

Section 3. "Harassment" is an action or communication, or pattern of actions and/or communications, that (1) is intended to humiliate, demean, denigrate, vilify, or stigmatize a particular student or employee, or group of students or employees; and (2) has the effect of creating a hostile academic environment for such student(s)or employee(s).

Section 4. "Intimidation" is a threat, assault, or other action or communication that (1) is intended to put one or more students or employees in fear of their life, their physical safety, or the security of their property, or the life, physical safety, or security of property of family members or friends; and (2) has the effect of putting the student or employee in such fear or would have the effect of putting a reasonable person in such fear.

Section 5. Persons who violate Section 2 of this regulation will be subject to the full range of disciplinary sanctions permissible under University disciplinary policies, which for students shall include dismissal or expulsion from the University.

Section 6. If a violation of Section 2 is committed because of the race, national or ethnic origin, gender, religion, sexual orientation, or disability of a student or employee against whom the action or communication is directed, such a discriminatory motivation shall be treated as an aggravating factor for the purpose of determining the appropriate penalty to be imposed on the violator, and shall provide a basis for enhancing the penalty beyond what it would have been absent such motivation.

Section 7. If a person violates any other applicable university misconduct rule, and the violation is committed because of the race, national or ethnic origin, gender, religion, sexual orientation, or disability of a student or employee against whom the action or communication is directed, such a discriminatory motivation shall be treated as a aggravating factor for the purpose of determining the appropriate penalty to be imposed on the violator and shall provide a basis for enhancing the penalty that otherwise would have attached to violation of that misconduct rule.

PROBLEM-SOLVING EXERCISE F

(The Sexual Harassment Problem)

The Education and Welfare Committee of the state senate in a populous state is considering the problem of sexual harassment on college campuses. The state has a large-scale public university system with nine campuses, as well as thirteen regional community colleges. There are also numerous private higher education institutions within the state's boundaries; many are four-year liberal arts colleges; some are large graduate institutions; and a few are specialty schools such as a school of art and design.

Various women's groups and civil rights groups urged the Committee to investigate problems concerning the sexual harassment of female students by male faculty members. Several state senators in districts with large college student populations also called for an investigation, and the state's Commissioner of Education advised the committee that she would support such an investigation.

After preliminary committee staff investigations revealed that sexual harassment is a real problem on numerous public and private campuses in the state, the Committee chair scheduled public hearings on the matter. The first group of witnesses were students or former students from institutions in the state who testified to their own experiences regarding sexual harassment on campus . The testimony of the following five students, as summarized in an interim staff report, is representative of the overall testimony of this group:

> Student A testified that she had been subjected to repeated sexual advances by her violin instructor, a faculty member in the music department of a private college. As a result (she testified), she found it impossible to continue her violin studies and has withdrawn from the department. She was too embarrassed and anxious at the time to report the matter to college administrators.
>
> Student B, who graduated from another private college with a degree in sociology, testified that she was propositioned by a professor who offered to give her an A in a sociology seminar in exchange for her compliance with his sexual demands. When she refused, she received a D in the course which (she claimed) did not represent a fair evaluation of her academic work but resulted solely from her rejection

of the professor's proposition. She complained to the chair of the sociology department, and then to the Dean, but never received any response other than one form letter from the Dean asserting that his office "would look into the matter."

Student C is a senior honors division student in chemistry at a public institution. She is enrolled in the senior research seminar, a two-semester course comprising half her credit load for the year. Chemistry honors students must take this seminar and receive at least a C in order to graduate with honors. The chemistry student testified that both the male professor who gives the seminar and the male graduate student assistant who supervises the laboratory are refusing to evaluate her work. This problem began after she had refused several invitations from the professor to go out with him (alone) for drinks after seminar meetings and several invitations from the graduate assistant to attend small weekend parties at his apartment. Since then, she has received no feedback about her progress in the seminar, even though other students regularly receive such feedback. As a result (she testified), she is "learning nothing" in the seminar, has no idea whether she will receive the C she needs to graduate with honors, and has no confidence that anyone in authority at her institution would be receptive to her complaints.

Student D, a sophomore at a public institution, testified that she has been harassed for two months by a senior male student. He made numerous harassing telephone calls to her (she said), sometimes lurked outside her classroom buildings before and after her classes, once entered her residence hall without her permission, and frequently made unwelcome comments to her when passing her on campus sidewalks or in the student union. Examples of such comments (also repeated in the phone calls), according to Student D's testimony, were: "I want you;" "I can't live without you;" "your eyes are so beautiful;" and "you have such a great body." Student D eventually complained to the dean of students, who called the alleged harasser in for a conference. When the activity continued, Student D complained again and asked to file charges, but the dean convinced her to let him refer the alleged harasser for counseling. The activity stopped temporarily, but had begun again shortly before Student D testified.

Student E, an undergraduate at the flagship campus of the public university system, took a biology class in which the male professor frequently made sexually suggestive comments and drew sexually suggestive diagrams on the blackboard. To illustrate the effects of outer space on the human body, for example, the professor used drawings of a shapely woman whose breast size changed with conditions of weightlessness. In other classes, the professor asked female students how they would describe "the physiology of love-making" and whether they thought of intercourse more in terms of "pleasure" or in terms or "reproduction."

As a result of such testimony, the Committee tentatively concluded that sexual harassment of female students by male faculty members and male students is a serious problem on campuses in the state; that when students have complained about such harassment, institutional administrators and faculty members have often failed to treat these complaints seriously or courageously; and that institutions' established grievance procedures and investigatory processes for dealing with sexual harassment are often not working effectively. The committee is now considering whether it should legislate in this area, and has called further witnesses to obtain their viewpoints on the advisability of legislation, and on the scope and terms of any such legislation.

The committee will hear from the president (a student) of the statewide Student Government alliance -- an umbrella organization representing the various student governments at both public and private institutions in the state; the chair of the Board of Regents of the state university system; the state affiliate of the American Association of University Professors; and the State Association of Independent Colleges and Schools. Among the questions the Committee is already considering (and for which it will seek enlightenment from the committee's counsel as well as from the witnesses) are these:

- Are there existing federal statutes or regulations or state common law principles that would already prohibit the types of harassment described to the Committee by the student witnesses above?
- If so, are there effective means for enforcing such statutes or regulations, or common law principles?
- If the state legislature were to draft sexual harassment legislation, should it cover both public and private institutions, and in the same way?
- Should the legislation cover student-to-student harassment as well as faculty-to-student and staff-to-student harassment? Homosexual harassment as well as heterosexual harassment?

- What kinds of substantive or procedural requirements should be built into the legislation?
- What enforcement mechanisms, and what remedies or penalties, should the legislation include?

APPENDICES

APPENDIX A

Constitution of the United States of America:

Provisions of Particular Interest to Postsecondary Education

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * * *

Section 7. All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

* * * *

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;

* * * *

To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

* * * *

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

* * * *

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

* * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * * *

Section 10. No State shall...pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts.

Article II

Section 1. The executive Power shall be vested in a President of the United States of America.

* * * *

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; ... he shall take Care that the Laws be faithfully executed....

* * * *

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

* * * *

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;...to Controversies to which the United States shall be a party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,...and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * *

Article IV

Section 1. Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State.

* * * *

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* * * *

Article VI

* * * *

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * *

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury...; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

* * * *

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI

The judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

* * * *

Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * * *

Amendment XXVI

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

* * * *

APPENDIX B

GUIDELINES FOR WORKING ON PROBLEMS 1-17

The guidelines in this appendix provide brief suggestions for working through the seventeen problems that appear in Part II of this *Supplement*. Each problem is keyed to one or more *LHE* subsections. The discussions in these subsections provide a foundation for analyzing each problem. The guidelines below provide more pointed suggestions about specific issues to consider or resources to consult. **STUDENTS WHO ARE DOING THESE PROBLEMS AS COURSE ASSIGNMENTS SHOULD NOT CONSULT THESE GUIDELINES UNTIL AUTHORIZED TO DO SO BY THE INSTRUCTOR.**

Problem 1

(*Secs. 2.3. & 2.4. Institutional Liability for the Acts of Others* and *Personal Liability of Trustees, Administrators, and Staff.*)

Defamation is the primary legal issue here, although other tort claims are possible (intentional infliction of emotional distress, tortious interference with contractual relations). The validity of the charges against Hall should be substantiated if Dean Moore intends to refer to them. How might this be done? Does Dean Moore have a legal or ethical duty to warn administrators at the neighboring state university? Even if she does not take any action to substantiate the charges? If she does not warn them, does she risk legal liability? For either basis of potential liability, is the institution potentially liable, or just the dean, or may they be jointly liable?

Problem 2

(*Secs. 2.3., 2.4., 2.5. Institutional Liability for the Acts of Others, Personal Liability of Trustees, Administrators, and Staff,* and *Institutional Management of Liability Risk.*)

Agency theory, the university's regulations regarding contracting, and the delegations of authority within the university are all important to this problem. For a public university, there may also be some type of state board or state agency regulation regarding contracting or delegations of authority. Defamation analysis should address the elements of a defamation cause of action, whether the Chancellor's remarks were privileged, whether Cade is a public figure, and (if so) the "actual malice" standard of *New York Times v. Sullivan*. Also of significance, in a public university, is whether the institution could be liable for defamation by the student newspaper in a situation where the Constitution would not permit the public university to dictate the newspaper's content. The *Mazart* case in *LHE*, § 2.3.1., p. 100, including the further discussion in sec. 4.13.4., is helpful on this point. State constitutions may provide analogous defenses for some private universities. Also in a public university, the question of whether the university may be protected by sovereign immunity -- or the Chancellor by official immunity -- could be relevant.

Problem 3

(*Sec. 3.2.5. Coexistence of Collective Bargaining and Traditional Academic Practices.*)

The interplay of mandatory, permissive, and illegal subjects of bargaining is the primary issue here. The analysis should examine which issues are the exclusive purview of the faculty union, and the legal implications of the president's permitting the faculty senate to deal with terms and conditions of employment. The *Knight* case (*LHE*, § 3.2.2., pp. 177-178) is relevant to this discussion. Students should also consider the teachings of *Yeshiva* (*LHE* § 3.2.3) in order to determine whether a powerful faculty senate would suggest that faculty are "managerial employees" and thus unprotected by the NLRA.

Problem 4

(*Sec. 3.3. Nondiscrimination in Employment.*)

This fact situation is similar to *Winkes v. Brown University*, 747 F.2d 792 (1st Cir. 1984). Is an outside offer an example of "any factor other than sex" for Equal Pay Act purposes? What if no outside offer existed, but the institution granted Gemini's request for a raise anyway? Would the institution have a successful defense to such an action?

A policy issue for consideration by administrators might be the impact of meeting Gemini's demands on faculty morale and internal equity versus external equity and affirmative action concerns.

In addition to the immediate concern, consideration could be given to whether the university could prohibit the engineering school from hiring any male faculty until more female faculty have been hired.

Problem 5

***(Secs. 3.5., 3.6., 3.7. Standards and Criteria for Faculty Personnel Decisions, Procedures for Faculty Personnel Decisions,* and *Faculty Academic Freedom.*)**

Legal analysis should involve attention both to potentially legitimate grounds for a tenure denial based upon concern for the department's curricular needs and to potentially illegitimate grounds for a tenure denial based upon considerations that could constitute an academic freedom violation. May an institution deny tenure to an otherwise qualified faculty member who simply is a poor "fit?" To a faculty member who is disliked by the faculty but otherwise qualified? A faculty member who has forcefully expressed views which other faculty members oppose? The *Mt. Healthy* standard (*LHE* § 3.7.6.) would apply to this case. For further guidance, see *Hildebrand v. Board of Trustees of Michigan State University*, 662 F.2d 439 (6th Cir. 1981) (*LHE*, § 1.4.1., p. 21), a case upon which the problem is loosely based.

A second issue worthy of discussion is whether the professor's procedural due process rights have been violated or whether he is entitled to any further procedural rights before the President makes the final decision. The difficulty for the professor here would be in identifying any liberty or property interest that would be infringed by the tenure denial.

Problem 6

(Sec. 3.8. Staff Reduction Due to Financial Exigency and Program Discontinuance.)

It is important to establish what contractual relationship exists between the faculty and the college, what guarantees the contract gives the faculty, what the differences are between the rights of tenured and non-tenured faculty members, and how the college can establish financial exigency. Is the college unionized, and what implications does the collective bargaining contract then have for a reduction in force? Would it be easier, from a legal defense standpoint, for the college to eliminate programs that are weak or duplicative rather than incurring across-the-board layoffs? For an example of one such attempt that survived legal challenge, see *Keppeler v. Board of Trustees of Community College District #15*, 688 P.2d 512 (Wash. Ct. App. 1984).

Problem 7

(*Sec. 4.1.3. The Contractual Rights of Students.*)

The primary issue is whether the "student handbook" is a contract. Disclaimers could remove its contractual status, although the court's analysis in *Beukas v. Fairleigh Dickinson University* (*LHE*, § 4.1.3., p. 375) should also be considered. Other issues to be discussed include the apparent authority doctrine and detrimental reliance. See also § 4.7.1. of *LHE* for discussion of the *Olsson* and *Blank* cases, pp. 471-473.

Problem 8

(*SECS. 4.5.2., 4.6.1., 4.8.2.; see also SECS. 4.12.1. & 5.7.*
***Codes of Student Conduct, Public Institutions*, and**
Public Institutions: Disciplinary Sanctions;
***Institutional Recognition and Regulation of Fraternal Organizations* and**
***Community Activities of Faculty Members and Students.*)**

Constitutional protections are at issue here because the institution is public; therefore, the Off-Campus Misconduct Policy must be specific enough to avoid charges of unconstitutional vagueness, and (since the code apparently could apply to expressive conduct) it must be clear enough to avoid charges of overbreadth. Each subsection of the policy must clearly define the prohibited behavior with sufficient clarity to satisfy the due process clause's notice requirement.

Under subsection (a) of the policy, it is not clear that the fraternity party was an "event sponsored or sanctioned by the university or one of its schools or academic departments." The university might want to add language such as this after "departments": ", or by a student organization recognized by the University."

The language of subsection (b) is also of concern, specifically the phrase "detrimental to the interests of the university." This language may suffer from vagueness both because it does not give students fair notice of what conduct is forbidden and because it does not set a meaningful standard to guide and limit the discretion of those who adjudicate Code cases. Also, how does the university fit the current situation into this language? Destruction of property is a criminal offense, public urination is probably a misdemeanor, and the noise from the party probably violated municipal ordinances against creating a public nuisance. The issue here, therefore, is whether the university can claim that, because these are its students, their off-campus conduct was "detrimental" not only to state and local government interests but also to the university's own interests.

Merely attending a party is probably not grounds for charging a student with a Code violation. If the university has a relationship or recognition statement with its fraternities (see *LHE* § 4.12.1.), the party may have violated the terms of that statement, and, if the statement so provides, the university might be able to revoke its recognition or sanction the fraternity in some way. But it is not clear that the university could use the Off-Campus Misconduct Code to take action directly against the fraternity, since the Code may only apply to individual students rather than student organizations.

The fraternity may also have liability under the state's social host law for damage done by a student intoxicated by the alcohol served at the party.

Problem 9

(*Secs. 4.7 & 4.8. Grades, Credits, and Degrees* and
Procedures for Suspension, Dismissal and Other Sanctions.)

Because the main issue is the student's academic performance, courts would generally be deferential to the academic judgments involved (see *Ewing* for assistance). But the case is complicated by allegations of faculty unprofessionalism and a lack of evaluative standards. The Provost should assess the impact of these allegations on this case, and their potential spillover effects on the other students in the department, before deciding the fate of the complaining student. The Provost should also determine whether there is any procedural defect in the process thus far and whether she must, as a matter of law, or should, as a matter of policy, provide any type of hearing or other procedural protection for the student before taking final action.

Regarding the second allegation in the student's petition, see the *Olsson* case, *LHE*, § 4.5, pp. 298-301. Regarding the fourth allegation, see *McIntosh v. Borough of Manhattan Comm. Coll.*, 433 N.Y. Supp. 2d 446 (1980), as well as *Ewing*. For further guidance, see also *Stoller v. College of Medicine*, 562 F.Supp. 403 (1983), and *Wilkenfield v. Powell*, 577 F.Supp. 579 (1983).

Problem 10

(*Sec. 4.11. Student Organizations.*)

Widmar is the leading precedent, and the U.S. Supreme Court's opinion in *Rosenberger v. University of Virginia*, not yet available at press time, will have particular relevance for this problem (the appellate court opinion is discussed in *LHE* at pp. 530-531). The First Amendment rights of students who do not wish their mandatory student fees used for certain expressive purposes is also relevant here--see the *Smith* case, discussed in *LHE* at pp. 521-523.

Problem 11

(*Secs. 4.6, 4.8, 4.13. Disciplinary Rules and Regulations, Procedures for Suspension, Dismissal and Other Sanctions*, and *Student Press.*)

The discussion of libel law in *Mazart* (*LHE* § 4.13.4.) suggests that the student editors may be exposed to liability. Regarding potential problems in establishing liability, see *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Regarding the university's liability, it is important to determine whether the student newspaper is an independent organization or an agent of the university (see *LHE*, § 2.3.1., pp. 100-101). Regarding the university's responsibility to deal internally with this matter, *Papish* (*LHE* § 4.13.3.) suggests that (unless it can demonstrate the article is libelous) the university may encounter constitutional difficulties if it attempts to discipline the student editors or to regulate the content of the newspaper.

Regarding dissemination of an article like this as an Internet message, see *Synfax Weekly Report*, April 25, 1994 ("E-mail, Institutional Liability, and Freedom of Expression") and *Synfax Weekly Report*, June 5, 1995 ("Computer Network Can Be Sued for Libel").

To what extent can administrators of private institutions control the content of student publications? For an analysis of the issue, see J. Gray and A. Ciotalo, "Student Press Protected by Faculty Academic Freedom Under Contract Law at Private Colleges", 52 *Educ. L. Rep.* 443 (1989).

Problem 12

(*Sec. 4.15.3; see also Secs. 7.5.2 & 7.5.7. Sex Discrimination, Title VI,* and *Scope and Coverage of Problems*)

This fact situation is somewhat similar to *Cohen v. Brown University*, discussed in *LHE* at pp. 567-569. On remand, the district court in *Cohen* ruled that Brown had violated Title IX. An appeal was pending at press time. Students should also determine whether the members of the men's team have a Title IX discrimination claim as well (refer to *Kelley v. Board of Trustees*, noted in *LHE* at p. 569). On what basis could a court find that the women's team has a viable Title IX claim but the men's team does not?

Problem 13

(*Sec. 4.16. Student Files and Records.*)

The primary issue here is whether Joshua's waiver of his rights under FERPA was an effective waiver. He did agree with the university's readmission condition on divulging his prior misconduct. But in order to be effective, a waiver must be knowing and voluntary. Joshua's attorney would probably argue that Joshua was unaware of his rights under FERPA, and that the university should have made him aware of exactly what rights he was waiving. On the other hand, the university had no legal obligation to readmit Joshua (see generally *LHE* § 4.2.6.), and it could be argued that the university, in order to protect its integrity and reputation, had the authority to impose disclosure obligations on Joshua in return for the privilege of being readmitted.

In Joshua's situation, two types of records are involved: academic records (his transcript) and disciplinary records (the information about his prior plagiarism, including the hearing and its outcome). Both types of records are "education records" under FERPA.

Joshua is unlikely to be able to maintain a private cause of action under FERPA (see *LHE*, p. 576, fn. 59) against the university, although he could file a claim with the Education Department in an attempt to have federal funds withheld until the university removes the information from his transcript.

Might Joshua also have a claim under state privacy law statutes or regulations, or under some invasion of privacy tort? (See *LHE* § 4.16.2.)

Was Joshua entitled to any kind of hearing or other procedural protection (under the due process clause or under FERPA) before the university imposed the condition on him?

Work on this problem can best be accomplished by consulting the full set of FERPA regulations published in C.F.R. (see *LHE*, p. 576). This problem thus provides a good opportunity for practice in the reading and application of administrative regulations.

Problem 14

(*Secs. 4.14.1 & 4.17.2. Housing Regulations* and *Protection Against Violent Crime on Campus*)

This problem combines elements of *Eiseman* (LHE, § 4.17.2., p. 587) and *Nero* (*LHE*, § 4.17.2., pp. 586-87, and Part II (D) of this *Supplement* (under sec. 4.17.)). Students should discuss whether the attack was foreseeable and whether the college's decision to assign this student to a residence hall with much younger students was negligent. Additionally, the issue of the college's nonenforcement of its alcohol policy should be addressed; *Furek* (*LHE*, § 4.12.2, pp. 536-537) provides some teaching on the relationship between the enforcement of a policy and institutional liability.

Problem 15

(*Secs. 6.2 & 6.4. State Provision of Public Postsecondary Education* and *State Regulation of Out-of-State Institutions.*)

Although the problem indicates that the state's coordinating board must approve all programs, students will need to assume additional facts about the state's regulatory power in order to provide a full answer to the problem. Potential issues to address include whether the programs developed for the off-campus sites are "new" programs and thus require state approval. The relationship between the college and the legislature will differ based on whether the college is constitutionally-based (which may result in little legislative control over how the college spends its funds) or statutorily-based (which would give the legislature considerably more control over how the college spends state funds).

Depending on how the neighboring states have defined a "postsecondary" program, the college's out-of-state television courses may require approval by the neighboring states. The college could argue, however, that the courses are "offered" on its own campus, in that no college employee physically enters the neighboring state to teach the course, and that the regulations of other states therefore do not apply. The university might also argue that the commerce clause or the First Amendment prohibit the other states from regulating.

The law related to these issues is likely to continue to develop as colleges find additional methods for delivering instruction beyond the borders of their campus.

Problem 16

(*Sec. 7.2.10. Copyright Laws.*)

For an analysis of whether an individual's creation is a "work for hire" under Sec. 101 of the Copyright Act, see *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166 (1989). Contract law may apply, depending on whether the university has issued regulations governing the allocation of royalties for inventions or creations by the faculty done wholly or in part in university facilities or on university time. See Simon, "Faculty Writings: Are They 'Works Made for Hire' under the 1976 Copyright Act?" 9 *J. Coll. and Univ. L.* 485 (1983). Similar problems can arise with patent royalties; see *LHE* § 9.4.3.

Problem 17

**(*Secs. 7.2.16. & 7.5.4.; see also Secs. 4.2.4.3. & 4.4.*
Americans with Disabilities Act and *Section 504.;*
Disability and *Support Services.*)**

This problem is similar to the facts of *U.S. v. Board of Trustees of University of Alabama* (*LHE*, § 4.2.4.3., p. 393-394), and addresses an issue that the court did not resolve in *Camenisch* (see *LHE*, § 4.4., pp. 451-452). With regard to the institution's responsibility vis-a-vis the prospective nursing student who is hearing impaired, *Southeastern Community College* (*LHE*, § 4.2.4.3., pp. 391-394) and *Doherty* (*LHE*, § 4.2.4.3., pp. 396-397) provide guidance. The analyses under Section 504 and the ADA are not substantially different.

APPENDIX C

GUIDELINES FOR COMPLETING PROBLEM-SOLVING EXERCISES

The following materials suggest avenues and issues to pursue in working through each of the six large-scale problem-solving exercises in Part II of the *Supplement*. Various readings are also suggested, including readings from *LHE*, to provide background or illustrations relevant to the exercises. **STUDENTS WHO ARE DOING THESE PROBLEM-SOLVING EXERCISES AS COURSE ASSIGNMENTS SHOULD NOT CONSULT THESE MATERIALS UNTIL AUTHORIZED TO DO SO BY THE INSTRUCTOR.**

The focus of the following guidelines is on the legal issues potentially raised by each problem. The listing of legal issues is not exhaustive; minor or secondary issues are not covered, and additional major issues could arise if additional information or role instructions are provided by the instructor.

Although these problems also raise policy issues (see Part I (D) of this *Supplement*), they are not covered by these guidelines. Similarly, these guidelines only occasionally address the strategy questions these problems may present or the longer-range preventive planning issues that may arise in the wake of each specific problem. Since approaches to such issues can be quite variable, numerous viewpoints and positions might be substantiated. Individual review or group discussion of these matters may be guided by the problem-solving directions and problem review questions that precede the problem-solving exercises.

PROBLEM-SOLVING EXERCISE A

1. The student's right to privacy is important, and must be guarded to avoid possible defamation liability or liability under some state law tort of invasion of privacy. A qualified privilege would likely apply if the dean and others who have been advised of Doe's condition disclosed that information only to individuals who need to know it. It is not clear that the school or the children's parents need to know it. See *LHE* § 2.3.1.2. for a discussion of defamation law and the privilege.

2. Because the education school is located in a state university, procedural due process protections would apply. The kind of process that is due depends upon whether the university characterizes its action as more akin to an "academic" decision or to a "disciplinary" action. The university might argue that, if the student cannot safely complete the student teaching requirements, he cannot meet the school's academic standards. Judicial reasoning in *Board of Curators v. Horowitz* (*LHE* § 4.8.3.) might apply by analogy. For a discussion of academic vs. disciplinary sanctions, see *LHE* § 4.8.3.

3. Another issue is whether the student is an otherwise qualified disabled student under Section 504 of the Rehabilitation Act and also under the ADA. The reasoning of *Southeastern Community College* suggests that a student who poses a risk of transmitting a fatal disease to children during his student teaching is not "qualified." But see the *Arline* case *(LHE* § 3.3.2.5.) for a discussion of how employers must evaluate whether an employee with a communicable disease is a safety hazard. Given current medical knowledge about how HIV is transmitted, it could be argued that Doe is not a threat, either to the children in his class, his fellow students, or his professors. A reasonable accommodation could be fashioned to ensure that he did not assist children who were injured on the playground.

4. Regarding the university's duty to warn the elementary school, the parents, or fellow students, the low risk of transmission makes it unlikely that the university would be covered by the qualified privilege if it disclosed Doe's illness to these individuals.

5. For further guidance on the above points and other potential aspects of the problem, see *LHE* §§ 2.3.1.1., 2.3.1.2., 4.2.4.3., 4.8.3., 7.5.4., and 7.5.7. For further information, see Brickley, "AIDS: A University's Liability for Failure to Protect Its Students," 14 *J. Coll. and Univ. L.* 529 (1988); and Woods and Steadman, "*Bradley Center, Inc. v. Wessner*: The Psychotherapist's Duty to Warn," 10 *J. Coll. and Univ. L.* 293 (1983).

PROBLEM-SOLVING EXERCISE B

1. There are several threshold, overarching issues concerning the Mental Health Policy on its face. First, some of its terms are broad and open-ended or unclear; there are therefore interpretive issues concerning the Policy's meaning and the extent of discretion allowed administrators, especially under section III. Second, some of the language is potentially so vague (e.g., mental disorder. . . adversely affecting...academic performance or behavior...in a way that is prejudicial to the institution or other members of its student body") that it raises issues of fourteenth amendment vagueness (see *LHE* § 4.6.1. for discussion of this doctrine). Third, the Policy includes no procedures by which to accomplish, or by which a student may challenge, an involuntary withdrawal -- thus raising issues of fourteenth amendment procedural due process. One basic question in this regard would be whether the procedures that the due process clause may require are akin to those for a disciplinary dismissal, or whether a different procedural model would be appropriate.

2. Concerning Dennis and Gerry specifically, there are various ways in which the Provost might seek to deal with their situations. Under section II of the Policy, the Provost might seek to refer the students for evaluation. Under section III, the Provost might seek to impose an involuntary administrative withdrawal from the university. Under the same section, the Provost might seek an involuntary withdrawal only from the residence halls. Alternatively, the Provost might seek to negotiate a voluntary withdrawal. Or the Provost could proceed under the Code of Student Conduct, treating the matter purely as a disciplinary problem. Or, prefatory to any of the above, the Provost might seek a temporary emergency suspension from the University or from the residence halls. The legal issues that arise will depend on which option(s) the Provost decides to pursue. Conversely, the option(s) that the Provost should pursue will depend in part on the legal risks that each option entails. Moreover, the legal analysis and weighing of legal risks that would occur in Dennis' case differ in part from those that would occur in Gerry's case, so each case should be considered separately.

3. Regarding both Dennis and Gerry, there are issues of whether they are disabled students within the meaning of Section 504 (*LHE* § 7.5.4.) or the ADA (*LHE* § 7.2.16.), whether they are "otherwise qualified" disabled students entitled to the nondiscrimination protections of the law, and whether such protections would have any application to Dennis' and Gerry's particular circumstances.

4. Regarding Dennis, there is a potential freedom of speech or freedom of religion issue. Some of Dennis's activities involve the expression of religious views. Even though these views are unpopular or offensive, their expression is likely to receive some protection under the first amendment. Such issues would arise if the university sought to punish Dennis for the mere expression of his views.

5. Regarding Gerry, there are issues concerning the interrelationship between the pending criminal trial and any internal proceeding the university might schedule . Although Gerry's lawyer's claim of double jeopardy is without merit (see *LHE*, § 4.5.3., p. 460), the university and the state prosecutors must take steps to protect Gerry's constitutional privilege against self-incrimination, and the university may be required by the due process clause to allow Gerry the assistance of counsel in any internal proceedings (see *LHE* § 4.5.3.).

6. A review of the policy, strategy, and legal implications of the Dennis and Gerry cases is contained in G. Pavela, *The Dismissal of Students With Mental Disorders: Legal Issues, Policy Considerations, and Alternative Responses*, pp. 77-79 & 83-87 (College Admin. Pubs., 1984). For further guidance, see *LHE* §§ 2.4.1., 4.1.3., 4.6.1., 4.8., 4.9.2., 4.14.1., 4.16., 4.5., 4.17.2., and 7.5.4.

PROBLEM-SOLVING EXERCISE C

1. Legal issues arise under both of the state statutes as well as under the campus conduct code. These issues implicate the rights of both the students and the "outsiders" (i.e., the non-student participants from the surrounding community). There are issues regarding interpretation of the statutes and code as well as federal constitutional issues. The constitutional issues involve both potential challenges to the statutes and the code on their face and potential challenges to these provisions as applied to the particular circumstances of this problem. In analyzing the various issues, one should consider whether there are any differences in the way the two statutes apply-to the students as opposed to the outsiders, and whether there are any differences between the rights of the students and the rights of the outsiders.

2. The interpretive issues focus on language in the statutes and code that is uncertain in meaning and application, making it difficult to determine whether the defendants' actions meet all the elements of the offenses with which they are charged. The most serious examples of this problem are probably the "malicious intent" language in sec. 11-321, and the "willful disturbance" and "willful interference" language in sec. 44-106. The "entry without lawful authority" language in sec. 11-321 also creates problems, especially as applied to the students. (Can the students be found to be trespassers on their own campus?)

3. The facial constitutional issues involve first amendment overbreadth challenges and first and fourteenth amendment vagueness challenges. (See *LHE*, § 4.5.2., p. 458, § 4.6.1., and § 5.6.3. for discussions of overbreadth and vagueness.) Probably the strongest challenges to be made would be first amendment vagueness challenges to the two state statutes.

4. The two statutes and the code, as applied to this situation, raise constitutional issues concerning the students' and the outsiders' free speech rights to engage in protest activities on the campus. In analyzing these issues, it is important to identify with precision the legitimate interests of the university or state that are implicated in this situation and the extent to which these interests are threatened by the students' and outsiders' activities. (For example, does the university have an aesthetic interest that is threatened?) In turn, it is important to identify the particular actions of the students and outsiders that allegedly threaten university or state interests: the erection of the huts? the interference with removal of the huts? the songs, chants, and other related protest activities?

5. This problem requires a consideration of the specific claims and defenses that could and should be asserted at trial on the state criminal charges and at the hearing on the code of conduct charges. Just as importantly, however, this problem requires a consideration of the possibilities for negotiation and settlement of this matter as an alternative to the trial and hearing. The question would be whether the university (or state), or the students or outsiders, should seek to negotiate a settlement and, if so, on what terms. The problem also requires consideration of whether and how the university should revise its own demonstration regulations to deal most effectively (and legitimately?) with future protests by the Coalition or other groups.

6. For good examples of cases in which the courts have analyzed issues like some of those suggested above, see *University of Utah Students Against Apartheid v. Peterson*, 649 F.Supp. 1200 (D. Utah 1986), and *Students Against Apartheid Coalition v. O'Neil*, 671 F.Supp. 1105 (W.D. Va. 1987), *affd.*, 838 F.2d 735 (4th Cir. 1988). For further guidance, see *LHE* §§ 4.5.2., 4.6.1., 4.9., 5.5,. and 5.6.3.

PROBLEM-SOLVING EXERCISE D

1. This problem pits the professors' alleged "academic freedom" in the conduct of their courses against institutional interests and student interests in the quality of education. It also involves the issue of whether the institution can expect "full-time work" from "full-time faculty."

2. It is important to establish whether the institution has published regulations concerning class cancellation policies, class attendance by faculty, or grading and evaluation requirements. Any such regulations are likely to be considered part of the institution-faculty contract. Courts have upheld institutional regulations requiring faculty to perform their assigned tasks. See *Keddie v. Pennsylvania State University*, 412 F.Supp. 1264 (M.D. Pa. 1976). As long as the regulations are clear, are applied consistently, and faculty have notice of them, it is unlikely that the faculty could claim substantive constitutional violations in their application.

3. Has the institution developed policies limiting the amount of time faculty may spend consulting? Courts have also permitted institutional regulations that either limit faculty consulting time or the amount of outside income a faculty member may earn (or both). See *Gross v. University of Tennessee*, 448 F.Supp. 245 (W.D. Tenn. 1978), aff'd, 620 F.2d 109 (6th Cir. 1980), where the court found no constitutional violation, either procedural or substantive.

4. Does the Department Chair serve on an at-will basis (at the pleasure of the dean, provost or president)? Is there a term of office? The university may be able to relieve Dr. Equine of his chair responsibilities without actually firing him as a professor.

5. What is the curricular content of Agronomy 301 supposed to be? Does it involve independent student work, or does the catalog bill it as a lecture or discussion course? Courts have viewed catalogs as having contractual features, so the course description is important regarding any possible suit by students as well as for what it suggests regarding faculty responsibilities to the institution.

6. Regardless of the answers to the above questions, because the university is public, procedural due process protections must be afforded any faculty member with a property interest in his or her job.

a. The department chair has presumably served satisfactorily as a faculty member, at least, for approximately two decades (although the vice-president should determine whether, in fact, this is so). His tenure contract clearly constitutes a property interest in his faculty position (though probably not in his department chair position). Moreover, the AAUP 1940 *Statement* and related documents provide that a tenured professor cannot be dismissed without just cause. Any effort to dismiss or discipline Dr. Equine therefore could only be taken after a full due process hearing had been held in which the university set out the reasons for the action and the supporting evidence. It is questionable whether the facts of the problem would be viewed as sufficiently serious to constitute cause for discharging a tenured professor of over twenty years' longevity. Furthermore, it is unlikely that such a hearing could be conducted "without any publicity."

b. Dr. Bovine will also be protected procedurally, although his case is not as compelling. He has an expectation of at least two more years of employment. Any move to discharge or discipline Dr. Equine would have to include due process protections similar to those that Dr. Equine is entitled to.

c. Dr. Swine's case is different. He is completing the last year of a three-year contract. If the incident occurred before the date by which assistant professors must be notified that their contracts will not be renewed, the university may simply not renew his contract, and a hearing need not be conducted (*Board of Regents v. Roth*, Part II(C) of this *Supplement* under sec. 3.6.2.)). However, if the incident occurred after the date by which nonrenewed faculty must be notified, then the university will either have to give Dr. Swine a one-year extension or conduct a hearing similar to that which must be afforded Dr. Equine and Dr. Bovine.

7. Other issues concern whether the students can file a breach of contract claim against the university. Although courts are deferential to academic judgments of faculty and administrators, this problem could be viewed as a case of unprofessional conduct, not academic judgment. It is unlikely that a trial judge would be sympathetic to a professor's claim that academic freedom permits him not to teach anything in the course.

8. See generally *LHE* §§ 3.1., 3.5., 3.6., 3.7., 4.1.3.

PROBLEM-SOLVING EXERCISE E

1. The ACLU's suit will likely challenge the Civility Code "on its face" and in its entirety, invoking the First Amendment as the primary support for the challenge. It is thus likely that overbreadth arguments and vagueness arguments will be central to the analysis. The four incidents where the code has already been applied could be used as examples for testing whether the Code as a whole, or particular Code provisions, are overbroad or vague.

2. Even if the provisions of the Civility Code are not overbroad or vague on their face, the Code provisions may still be invalid in some of their applications under the First Amendment. Such issues could also become part of the ACLU's law suit, and the four incidents where the Code has already been invoked could again be examples. Would the Code be unconstitutional as applied to one or more of these incidents?

3. To refine the analysis suggested in points 1 and 2, it is necessary to address each operative section of the Code (i.e., sections 2-7), considering each against the backdrop of section 1. For section 2, it is also necessary to distinguish among the three groups to which this section may apply: (a) students, (b) employees (faculty, administrators, and staff), and (c) outsiders who are not members of the university community. Different legal considerations may pertain not only from one section of the Code to another, but also from one of these groups to another.

4. In order for the university to defend its Code as being constitutional in all or some of its applications, it must demonstrate that the Code is based on some regulatory rationale that does not violate First Amendment principles. What rationale(s) (if any) might fit (and which sections and applications might they fit): A fighting words rationale? Obscenity? Incitement? Defamation? A "time, place, and manner" rationale? A "nonspeech" rationale, i.e., that the regulated activity is conduct rather than speech? To the extent that one or more of these rationales do not validate the Civility Code on its face, or in its applications, what other rationale(s) (if any) would do so?

5. Section 4.10. of *LHE* provides guidance for addressing the issues raised in points 1-4 above. For additional guidance on analyzing the Code's applications to faculty members, see footnote 35 in *LHE* § 4.10. and *LHE* §§ 3.7.1. to 3.7.5.1. (especially the *Martin v. Parrish* case in 3.7.2. and the *Levin* case in 3.7.3.); see also *Jeffries v. Harleston*, 52 F. 3d 9 (2d Cir. 1995), set out in Part II (C) of this *Supplement* (under secs. 3.7.1.-3.7.6.). For additional guidance on other issues that could

arise regarding the Code's applications to persons who are not members of the campus community, see *LHE* § 5.6. For further general assistance, see the entries in the bibliography for *LHE* § 4.10.

6. Attempts to penalize violators of the Civility Code could also raise procedural due process issues regarding the sufficiency of the procedures utilized in determining the violation. See *LHE* § 4.7.2. (students), *LHE* §§ 3.6.2. and 4.8.2. (faculty), and *LHE* § 5.6.3. (outsiders). Regarding the Code's application to outsiders, there could also be issues concerning the university's authority to regulate access to the campus and to banish certain persons from the campus (see generally *LHE* §§ 5.6.1. and 5.6.3.).

PROBLEM-SOLVING EXERCISE F

1. This problem differs from problems A-E in that the context is the legislative process and the focus is state-wide rather than limited to a single institution. (The problem-solving directions and questions at the beginning of the problems therefore have less applicability to this problem.) In addition to legal issues as such, this problem will also prompt consideration of the legislative process as a forum for resolution of higher education problems, consideration of legislative drafting strategies, and further consideration of the law/policy distinction (see Part I, section D of this volume) especially as it applies to the interrelation of public law and public policy in the legislative process.

2. This problem concerns both student rights (and responsibilities) and faculty and staff rights (and responsibilities). Questions regarding the state legislature's authority, and its potential conflict with institutional authority and institutional internal law (see Part I, sections B & C, of this *Supplement*) may also arise. Since the legislature is studying sexual harassment at both public and private institutions, attention must be given to whether legal rights and responsibilities, legislative authority, or institutional authority would differ for legislative coverage of private, versus public, institutions.

3. Regarding existing law and existing legal rights, a major consideration would be whether and when the types of harassment alleged here would constitute sex discrimination prohibited by Title IX. Students may also have contractual rights (substantive or procedural) to assert under their contracts with the institution. In addition, tort law may be a relevant source of students' rights to be free from harassment. Regarding faculty members, a major legal issue (or set of issues) concerns the nature and extent of protections that accused faculty members may have under their contracts with the institution. Moreover, faculty rights might also be infringed by false student accusations which, if publicly disseminated by students or administrators, could under certain circumstances be considered to be defamation or a tortious invasion of privacy. Faculty and staff members charged with sexual harassment may also have procedural due process protections under federal and state constitutions and perhaps free speech protections that would support claims that certain applications of harassment rules would interfere with faculty academic freedom.

4. Another, difficult, issue regarding existing law would be whether and when Title IX (or other sources of law) would cover student-to-student sexual harassment (for instance, the type of harassment described in Student D's testimony).

5. For guidance on the above issues, see *LHE* §§ 2.3.1., 2.4.1., 3.5.2., 3.6., 3.7.2., 3.7.5., 4.7.3., and 7.5.3.